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No. 80-89

In the
Supreme Court of the United States
OCTOBER TERM, 1980

LEAK REPAIRS, INC.,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Leak Repairs, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit Court of Appeals enforced an order of the National Labor Relations Board, in an order reproduced in the Appendix, and not otherwise reported. The National Labor Relations Board's decision and order, adopting the decision of an administrative law judge, will be reported at 241 NLRB No. 38. It and the administrative law judge's decision is reproduced in the Appendix.

JURISDICTION

The Seventh Circuit Court of Appeals issued its order on May 21, 1980. This petition is brought within ninety days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) If cause and anti-union animus both exist where an employer discharges an employee, may the National Labor Relations Board (and the Courts of Appeals) decide that the discharge violates section 8(a)(3) of the National Labor Relations Act, without inquiry into whether the employee would have been retained "but for" the misconduct creating "cause"?

(2) Whether this Court's rationale in *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274 (1977), applies under section 8(a)(3) of the National Labor Relations Act, to determinations of employer motive for discharging an employee?

STATUTE INVOLVED

The National Labor Relations Act, 29 U.S.C. §§151 *et seq.*. provides in section 8(a)(3), 29 U.S.C. §158(a)(3):

> It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

and in section 10(c), 29 U.S.C. §160(c):

> . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Section 10(f), 29 U.S.C. §160(f) provides:

> Any person aggrieved by a final order of the Board * * * may obtain a review of such order in any United States Court of Appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, * * * *

STATEMENT OF THE CASE

The Board's order reinstating two discharged employees, enforced by the United States Court of Appeals for the Seventh Circuit, was based on a finding of violation of §§(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1) and (3) ("the Act"). The Court of Appeals had jurisdiction to enforce the order of the Board under section 10(e) of the Act, 29 U.S.C. §160(e). No challenge was raised to the §8(a)(1) finding before the Seventh Circuit, nor is any raised here.

The circumstances behind the §8(a)(3) finding involved a situation sometimes referred to as "mixed motive" discharges; *i.e.*, two employees who were union advocates were also, admittedly, guilty of misconduct and were discharged. The company was opposed to unionization.

Leak Repairs is engaged in a new business, repair of leaks in steam and chemical systems and piping while the systems are functioning. This work requires minutely precise measurements of the affected pipe. The employees intentionally misrepresented the critical measurement of a gap between flanges in sections of a pressurized steam pipe for which a special sealing clamp was to be designed and manufactured. The clamp thus did not fit, the repair was not effected, and an expensive fixture was wasted. The administrative law judge found

that the employees had "made a mistake at the ECI job," that, whereas the employees had been instructed by management to fill out the data sheet forms accurately, they failed in not "sufficiently and clearly apprising their superiors of their improvisation" in under-reporting the width of the gap as 3.50 inches although they had measured it at 3.80 inches. (Report of administrative law judge, Appendix at 15a, 23a).

The administrative law judge also found that these two employees had been active in propagandizing for a union and concluded "that Respondent, in summarily firing employees Jenkins and Paver on June 13, 1977, was motivated at least in part by their union and related protected concerted activities." (21a *infra*) Because the administrative law judge believed that "a discharge motivated only in part by an unlawful purpose is similarly illegal," (Appendix at 21a), he concluded that the terminations here violated the Act.[1]

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[1] The administrative law judge, and the Seventh Circuit on review, both announced the standard that even partial anti-union animus sufficed to constitute a §8(a)(3) violation. However, each found that the "real reason" for the discharges here was the anti-union animus; and that the "for cause" reason was merely seized upon. But neither the Board nor the Court of Appeals analyzed the fact situation to determine if the employees would have been retained "but for" the anti-union considerations. The Seventh Circuit observed that it had never endorsed a "but for" test, and refused to apply such analysis here. Appendix at 30a. The conclusion that forbidden motives constituted the "real reason" for the discharge, therefore, was reached solely in the announced context that *any* anti-union animus would be enough to condemn the employer's action.

Givhan v. *Western Line Consol. School Dist.*, 439 U.S. 410 (1979), represented a closely analogous situation, where a "but for" test was appropriate but was not

The Seventh Circuit here concluded

> It is true, as the Board found, that Paver and Jenkins made "a mistake in judgment by not sufficiently and clearly apprising their superiors of their improvisation."

Appendix at 33a. That may be translated to read, "It is a mistake to lie to your superior about an important commercial matter without sufficiently and clearly telling him you are lying." The Court went on to hold that "the discharge of Paver and Jenkins violated Sections 8(a)(1) and (3) of the Act if it was motivated even in part by anti-union considerations." Appendix at 30a.[2] The

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([1] Continued)
applied. Even though the trial court had found that an unconstitutional factor was the "primary" reason for a decision not to rehire an employee, this Court remanded for a new fact determination under the appropriate 'but for" analysis. 439 U.S. at 417.

As the First Circuit has observed, "the Board all too often has either disregarded altogether the valid reasons for the employers' conduct, or has labeled the good reason pretextual, although it was apparent that it was a good reason of substance." *NLRB* v. *Eastern Smelting & Refining Corp.,* 598 F.2d 666, 671 (1st Cir. 1979).

[2] The full statement reads "Respondent concedes that the discharge of Paver and Jenkins violated Sections 8(a)(1) and (3) of the Act if it was motivated even in part by anti-union considerations." Respondent sent a letter to the Court, following oral argument and before decision, explicitly contending that the correct standard was a "but for" test, rather than the "even in part" test,, in view of this Court's opinion in *Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977). Petitioner has no explanation for why the Seventh Circuit stated that petitioner had conceded.
Respondent maintains that anti-union animus played no part whatsoever in the decision to terminate these employees, even though that was not the finding of the administrative law judge.

Seventh Circuit affirmed the finding that anti-union considerations were, indeed involved, and thus enforced the Board's order.

Petitioner has been cited for a violation of §8(a)(3) because the administrative law judge found that one of the employer's motives for discharging two employees was their union activities. However, the employees, according to the Board's own findings, had intentionally and seriously erred on the job. No administrative law judge, board, or court has ascertained whether the employees here involved would have been retained *but for* their union activities.

REASONS FOR GRANTING THE WRIT

The decision of the Seventh Circuit is in direct conflict with decisions of the First, Second, Fourth and Eighth Circuits, which hold that the principle enunciated by the Court in *Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977), (a First Amendment case), and noted in *Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 270 n.21 (1977) (a Fourteenth Amendment and Fair Housing Act case), that mere engaging in protected activity by an employee will not vitiate the employer's right to dismiss an employee who, absent the protected activity, still would have been dismissed lest such an employee be placed "in a better position as a result of constitutionally protected conduct than he would have occupied had he done nothing." (429 U.S. at 285)

I. CONFLICT AMONG THE CIRCUITS

Had the case been in the First, Second, Fourth, or Eighth Circuit, a different standard would have been applied in adjudging the discharges. Those circuits require the Board to demonstrate that an employee would not have been discharged *but for* his union activities.

The contrast with the Seventh Circuit's position could not be more stark:

> Respondent contends, however, that a legitimate reason existed for their discharges—their failure to report the accurate measurements for the refinery leak. Consequently, it argues the burden rests with the Board to establish that the discharges would not have resulted from that purportedly legitimate basis alone. This Court has never endorsed such a "but for" test, Chicago Magnesium Castings Co. v. NLRB, 612 F.2d 1028, 1034 (7th Cir. 1980), and we

find the cases cited by respondent in support of such a standard to be inapposite.

Here is how the First Circuit set forth the test for "mixed-motive" firings in *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670-671 (1979):

> The employer always asserts a good motive and the Board a bad one, and the division is not so simplistic. We envisage a greater number of possibilities.
>
> • • •
>
> Even if the Board can meet its burden of demonstrating improper motivation, the matter does not end there. The employer may still defend by proving that there was a good reason for the discharge and that "it would have reached the same decision . . . even in the absence of the protected conduct." *Mt. Healthy City Board of Educ.* v. *Doyle*, 429 U.S. 274.

In its cited case, *Chicago Magnesium Castings*, the Seventh Circuit recognized the First Circuit's opinion in *Eastern Smelting* as expressive of the "but for" test *that the Seventh Circuit was rejecting.*

The Seventh Circuit dismissed petitioner's citation of *Mt. Healthy* and *Eastern Smelting* as "inapposite," and ruled that *any* improper motivation on the employer's part was enough to constitute a §8(a)(3) violation or, as it put it a few months earlier in *Chicago Magnesium Castings*, "[T]he Company's obviously *tainted* motive *vitiated* any legal grounds it might otherwise have had." (612 F.2d at 1034, Emphasis supplied) Although the decision at bar is not to be published, *Chicago Magnesium* has been published and will govern in the Seventh Circuit. The decision at bar shows how implacably the Seventh Circuit will apply its *Chicago Magnesium* doctrine.

In the Second Circuit, the "but for" test is also the rule. In 1978, citing *Mt. Healthy*, that circuit announced

> [W]here the employer was motivated by both valid and invalid reasons, a rule of causation is indispensable. . . . The magnitude of the impermissible ground is immaterial . . . as long as it was the "but for" cause of the discharge.

Waterbury Community Antenna, Inc. v. *NLRB,* 587 F.2d 90, 98 (2nd Cir. 1978). This is the same "but for" test that the First Circuit enforces, and the Seventh Circuit has "never adopted."[3]

Again, in the Fourth Circuit, the rule is that causation in a "but for" sense must be proved. The mere coexistence of an improper motive is not enough.

> [A]n unfair labor practice may be found only if there is a basis in the record for a finding that the employee would not have been discharged, though he may have been subjected to a milder form of punishment for the offense, except for the fact of his union activity.

Neptune Water Meter Co. v. *NLRB,* 551 F.2d 568, 570 (4th Cir. 1977).

And in the Eighth Circuit, the rule is the same, with the court relying upon the Fourth Circuit's formulation. *See Keokuk Gas Service Co.* v. *NLRB,* 580 F.2d 328, 335 (8th Cir. 1978), *citing Neptune Water Meter Co.*

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[3] The administrative law judge in this case relied upon a much earlier Second Circuit case, J.P. Stevens & Co. v. NLRB, 380 F.2d 292, 300 (2nd Cir.), *cert. denied,* 389 U.S. 1005 (1967), for the rule that "a discharge motivated only in part by an unlawful purpose is similarly illegal". His opinion reflects no awareness of the later Second Circuit position.

The Ninth Circuit has explicitly rejected the formulation used by the Seventh Circuit, that any decision "in part" motivated by anti-union animus is illegal. *Western Exterminator Co.* v. *NLRB,* 565 F.2d 1114, 1119 (9th Cir. 1977). However, it has not explicitly accepted the "but for" formulation adopted by the First, Second, Fourth and Eighth Circuits.

The Fifth Circuit has ruled that "[H]aving anti-union animus by itself does not violate section 8(a)(3)" and "Once the employer established just cause, the burden then shifted to General Counsel to prove that the employer's anti-union animus was the motivating factor. . . ." *NLRB* v. *Collier,* 553 F.2d 425, 428 (5th Cir. 1977); *Delco-Remy Division, General Motors Corporation* v. *NLRB,* 596 F.2d 1295, 1305 (5th Cir. 1979); but *see NLRB* v. *Big Three Industrial Gas & Equipment Co.,* 579 F.2d 304 (1978) which seems to pose a balancing test. The Fifth Circuit cases seem unclear and that Circuit has not announced that the "but for" test is the appropriate means of ascertaining what the motivating factor actually was.[4]

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[4] The Third Circuit has in a single opinion expressed a rule reflecting elements of both the "but for" and the "in part" tests, without any recognition of inconsistency. *See Edgewood Nursing Center, Inc.* v. *NLRB,* 581 F.2d 363, 368 (3rd Cir. 1978).

In the District of Columbia Circuit, one panel has announced the "but for" test in §8(a)(3) cases, "In order to establish a section 8(a)(3) violation the Board must find that the employee would not have been discharged but for his union activity." *Midwest Regional Joint Board, Amalgamated Clothing Workers of America* v. *NLRB,* 183 U.S. App. D.C. 413, 564 F.2d 434, 440 (1977). *Another* panel has applied a test closer to the Seventh Circuit's, "A discharge is unlawful if motivated even in part by anti-union animus. . .," *Allen* v. *NLRB,* 183 U.S. App. D.C. 83, 561 F.2d 976, 982

On the other side of the conflict, the Tenth Circuit supports the Seventh Circuit's approach, that *any* anti-union animus involved in an employment decision renders the decision vulnerable under §8(a)(3). "Discrimination need be but a partial motive for a discharge in order to be violative." *NLRB* v. *Montgomery Ward & Co., Inc.*, 554 F.2d 996, 1002 (10th Cir. 1977). *See also Head Division, AMF, Inc.* v. *NLRB*, 593 F.2d 972, 975 (10th Cir. 1979).[5]

A conflict among the circuit courts of appeals has traditionally been strong reason for the Court to grant *certiorari* and is one of the stated reasons therefore in the Court's Rule 17. The conflict here is direct and pervasive on a section of the nation's basic labor law under which cases are constantly arising. Every circuit has expressed itself. The Sixth, Seventh and Tenth Circuits support the rule that *any* anti-union animus will *vitiate* an employer's otherwise valid action. The First, Second, Fourth, Eighth and Ninth Circuits have rejected this view. Of these, all but the Ninth apply the alternative rule that anti-union animus will condemn an employer's action only if the employee would otherwise not have been disciplined. The Third and Fifth Circuits have

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([4] Continued)
(1977). And a third panel has held that the test is to ascertain the "real reason," without stating whether the "but for" test is the appropriate way of determining the "real reason." *District 65, Distributive Workers of America* v. *NLRB*, 193 U.S. App. D.C. 1, 593 F.2d 1155, 1166 (1978). There has been no *en banc* opinion to arrive at a single expression of the rule in the District of Columbia Circuit..

[5] The Sixth Circuit appears to follow the same rule, but has only expressed itself in the context of §8(a)(1), not a §8(a)(3) charge. *See NLRB* v. *Elias Brothers Restaurants*, 496 F.2d 1165, 1167 (6th Cir. 1974).

expressed a test in terms of finding the *real* reason behind an employer action. And different panels of the District of Columbia Circuit have held each of these positions.

This sharp conflict is more than dialectical. The opposing theories well may lead to different decisions in identical fact settings. In the Seventh Circuit the guarantee of Section 10(c) of the Act (29 USC §160(c)) that an employer may discharge any employee, union adherent or otherwise, "for cause" has been negated. Mere existence of anti-union animus will contaminate a separation. However, the First Circuit made it clear in *Eastern Smelting* that the members of the court "will adhere to our promise" not to "rescue [the Board] if it does not both articulate and apply our [but for] rule". (598 F.2d at 671-2) The Seventh Circuit dismisses *Eastern Smelting* as "inapposite" and adheres to its own vague rule of which the Board took advantage here. (Contrary *Eastern Smelting* is; inapposite it certainly is not.) The other circuits that have faced the issue seem equally firm in their positions.

It is predictable that if the matter not be settled, sophisticated multi-state employers will utilize the liberal appeal venue provisions of the Act to bring their petitions to set aside believed improper Board orders in the First, Second, Fourth or Eighth Circuits if they be incorporated or maintain their principal place of activity in one of the states within those circuits, even though the alleged unfair labor practice occurred in Sixth, Seventh or Tenth Circuits. While such conduct may be derided as forum shopping, the fact remains that any lawyer true to his duty to protect his client's interest by all lawful means, will advise his client to take ad-

vantage of the Act's venue provisions and seek a circuit following the "but for" rule.

Section 8(a)(3) is the most frequently used unfair labor practice section of the Act.[6] As things now stand, it is impossible for the National Labor Relations Board to apply that section of the law consistently throughout the country. Yet the Board has not sought *certiorari* from any decision applying the "but for" test. Employers should not have to endure the present unseemly and stubborn controversy among those courts. The Court can settle the controversy and furnish binding guidance to administrative law judges, the Board, the courts of appeal and bewildered employers. In the interest of fair administration of the Act the Board should join in Petitioner's request for the writ.

II. THE APPLICABILITY OF MT. HEALTHY

The problem of motivation with respect to hire or tenure of employment is not new[7] nor is it any longer

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[6] Tables 2 to the *Annual Reports* of the *National Labor Relations Board* for 1977, 1978 and 1979 show that charges filed against employers under Section 8(a)(1)(3) constituted 50.56%, 49.7% and 46.6% respectively, of total unfair labor practice charges against employers in those years.

[7] *See, e.g.*, A. Cox, *Some Aspects of the Labor Management Relations Act*, 1947, 61 Harv. L. Rev. 1 (1947); *Note, Proving an* 8(a)(3) *Violation, the Changing Standard*, 114 Penn. L. Rev. 866 (1966);
T. Christensen & A. Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 Yale L.J. 1269 (1968);
M. Shieber & S. Moore, *Section* 8(a)(3) *of the National Labor Relations Act: A Rationale—Part II, Encouragement or Discouragement of Membership in Any Labor Organization and the Significance of Employer Motive*, 33 La.L.Rev. 1 (1972);

limited to Labor Act cases. The Wagner Act (1935) provided that discrimination in employment, to be illegal under the Labor Act, must be practiced "to" discourage unionization. The 1947 Taft-Hartley Amendment did not change this, although it inserted in section 10(c) the guaranty of the right to discharge for cause. In 1951 the Court, in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, recognized that in 1947 Congress "expressed disapproval of the manner in which the courts were applying their own standard [of review]." (340 U.S. at 483-84) Since *Universal Camera* was decided, other statutes prohibiting employment discrimination for reasons of race or sex have come into existence and constitutional liberties exercised under the First Amendment have been given greater protection. The problem in all these cases is essentially the same—was employment denied or interfered with for an illicit or for a proper reason? So far as the Labor Board goes the concerns for thorough review are eroding in some circuits and, as here, courts of appeal are permitting the Board from undisputed facts to draw fanciful conclusions that are obnoxious to common sense.

In *Mt. Healthy, supra,* a school board's determination not to rehire a teacher had been overturned by a court because a "substantial part" of the school board's decision was premised on the teacher's exercise of First Amendment rights. This Court vacated and remanded for a determination of

> whether the [School] Board had shown by a preponderance of the evidence that it would have reached

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(7 Continued)

Comment, Employer Discrimination Under Section 8(a)(3), 5 U. Tol. L. Rev. 722, 765 (1974) ("In attempting to clarify or identify predominating reasons or motives behind employer actions where there may be some legal and some illegal motives, the courts have developed a 'but for' test.")

> the same decision as to respondent's reemployment even in the absence of the protected conduct.

429 U.S. at 287.

Mt. Healthy was cited to the Seventh Circuit which in its per curiam, unpublished opinion, dismissed *Mt. Healthy* as "inapposite".

The question thus is whether the same formulation ought to apply to employees asserting statutory rights as is applied to employees asserting federal constitutional rights. The Court explained the logic of its rule in *Mt. Healthy,* and criticized the trial court's rule that any "substantial" reliance on an impermissible motive would taint the employment decision:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.

429 U.S.at 285.

The Second Circuit has followed this identical reasoning in the context of an employee asserting national labor law rights:

> Without a "but for" test, we "could place an employee in a better position as a result of" his organizational efforts "than he would have occupied had he done nothing."

Waterbury Community Antenna, Inc., supra 587 F.2d at 99.

The Second Circuit concluded, "[I]t is doubtful whether a test which is adequate to protect First Amendment rights would prove inadequate to protect organizational rights." *Id.*

The First Circuit also premised its "but for" causation test on *Mt. Halthy,* and recognized that a test formulated in the context of First Amendment rights was more than adequately protective of an employee's organizational rights.

> The Board has never mentioned *Mt. Healthy,* let alone explained why it should be thought less serious to violate the First Amendment than the Labor Act. *Mt. Healthy* and *Givhan* v. *Western Line Consol. School Dist.* . . . , are not labor cases, but involved the discharge of teachers by school boards assertedly because they had engaged in constitutionally protected speech. As we pointed out in *Coletti's Furniture, Inc.* v. *NLRB,* 1 Cir. 1977, 550 F.2d 1292, 1293, the principle is the same.

NLRB v. *Eastern Smelting & Refining Co., supra,* 598 F.2d at 671 & n. 10.

The First Circuit has applied *Mt. Healthy* in a series of labor cases, but the National Labor Relations Board has not sought *certiorari* in any of them.[8]

The Board is aware of this conflict, and employees of the Board have admitted in public comment that the difference between the "in part" and "but for" tests must be resolved by this Court.[9] It apparently is the Board's

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[8] *Coletti's Furniture, Inc.* v. *NLRB,* 550 F.2d 1292 (1st Cir. 1977); *NLRB* v. *Rich's of Plymouth, Inc.,* 578 F.2d 880 (1st Cir. 1978); *Hubbard Regional Hospital* v. *NLRB,* 579 F.2d 1251 (1st Cir. 1978); *Liberty Mutual Ins. Co.* v. *NLRB,* 592 F.2d 595 (1979); *NLRB* v. *Eastern Smelting and Refining Corp.,* 598 F.2d 666 (1st Cir. 1979); *Texas Instruments, Inc.* v. *NLRB,* 599 F.2d 1067, 1073 (1st Cir. 1979); *NLRB* v. *Wilson Freight Co.,* 604 F.2d 712, 721 (1st Cir. 1979), *c.d. sub nom; Smith* v. *Wilson Freight Co.* on different §8(a)(4) question, April 14, 1980, 48 L.W. 3659.

[9] See Remarks of Robert E. Allen, Director, NLRB Office of Appeals, in 30 Daily Labor Report A-4 (Feb. 12, 1980).

view that *Mt. Healthy* does not apply to labor cases.[10] Yet the Board, thus far, has not so much as discussed *Mt. Healthy* in a Section 8(a)(3) context and explained its position.

The "but for" test of causality applies to Title VII (42 U.S.C. §2000e *et seq.*) cases as well. The Court held, in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976) that the appropriate standard of proof required a showing "that race was a 'but for' cause" of disparate treatment. Citing *Mt. Healthy,* in a failure-to-hire Title VII case, this Court held, "even assuming, *argeundo*, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event." *East Texas Motor Freight* v. *Rodriguez,* 431 U.S. 395, 404 (1977). *See also International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 368 (1977); *cf, Arlington Heights* v. *Metropolitan Housing Corp.,* 429 U.S. 252, 271 n.21.

The absence of any expressed rationale for not applying the *Mt. Healthy* rule of causation to determinations of cause under the national labor laws, while that rule of causation applies to constitutionally protected and Title VII rights, is mirrored by the absurdity of two different rules co-existing in a single workplace. Suppose two employees engage in the same business-related error meriting discharge. One is a union advocate. The other is a black man. Both are discharged. Although the employer is motivated, in part, by his antipathy toward unions in the one case and by racial bigotry in the other, both employees would still have been discharged anyway.

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[10] *Id.*

The black man's firing is legal; but the union advocate's, under the Seventh Circuit rule, is not, even though Section 10(*c*) of the Labor Act supposedly guarantees the right to discharge for cause.

The intervention of this Court is required to set a single coherent rule for resolving causation questions in the employment context. There should not be one rule for union organizational rights, and a different rule for equal employment opportunity and federal constitutional rights.

Whether we be correct in our belief that the "but for" test should be applied to Labor Board cases is not, for the moment, important. What is important at this point is that an irreconcilable conflict between important circuits exists that prevents uniform application of basic labor law throughout the country. We respectfully suggest this Court should bring an end to this chaos.

• • • •

Petitioner prays that the writ of *certiorari* issue.

Respectfully submitted,

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JULY 16, 1980

APPENDIX

241 NLRB No. 38

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LEAK REPAIRS, INC.

and

MILTON LOUIS JENKINS AND VINCENT LAWRENCE PAVER

D—4831

Chicago, Ill.

Case 13—CA—16838

DECISION AND ORDER

On November 24, 1978, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and supporting argument and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Leak Repairs, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. March 20, 1979

.....
John H. Fanning, Chairman

.....
John A. Penello, Member

.....
John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges
JD—783—78
Chicago, IL
Case 13—CA—16838

LEAK REPAIRS, INC.

and

MILTON LOUIS JENKINS
An Individual

VINCENT LAWRENCE PAVER
An Individual

William G. Kocol and
Bruce G. Conley, Esqs.,
for General Counsel.
Michael B. Erp, Esq.,
for Charging Party.
Fred H. Daugherty, Esq.,
for Respondent.

DECISION

FRANK H. ITKIN, Administrative Law Judge. This hearing was conducted in Chicago, Illinois, on February 23 and 24, 1978. The unfair labor practice charge was filed on September 13, 1977. The complaint issued on November 9, 1977, and was later amended at the hearing. The principal issue presented is whether Respondent Company violated Section 8(a)(1) and (3) of the National Labor Relations Act by threatening employees with layoff, plant closure and other reprisals if they chose union representation and, further, by discharging employees Milton Louis Jenkins and Vincent Lawrence Paver because of their union and related protected concerted activities. Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs of counsel, I make the following findings of fact and conclusions of law:[1]

Findings Of Fact

Respondent Company maintains facilities in Alvin, Texas, and in Alsip, Illinois. Respondent is engaged in the business of providing "on steam" repairs to leaking equipment and piping systems. During the prior calendar year, Respondent received goods and materials at Alsip valued in excess of $50,000 directly from outside of Il-

[1] General Counsel's motion to correct the transcript, dated April 5, 1978, which is unopposed, is granted.

linois. During this same period, Respondent rendered services from its Alsip facility valued in excess of $50,000 directly to enterprises outside of Illinois. I therefore find and conclude, as admitted, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

A. Employees Jenkins And Paver Attempt To Get Union Representation

Milton Louis Jenkins, a charging party, testified that he started his employment with Respondent Company at Alsip about February 12, 1977, as an assistant technician. About mid-April, Jenkins discussed the advantages of union representation with co-employee Vincent Lawrence Paver, also a charging party. Jenkins and Paver thereafter discussed this subject "almost on a daily basis" among themselves and with other employees. Jenkins also attempted, without success, to enlist the assistance of a labor organization, Pipefitters Local 729, in this organizational effort. As Jenkins testified:

> I told Paver that I had talked to Enright from the Pipefitters and that they didn't want to get involved in our situation. I told him that we ought to get the employees together for a meeting and make some type of list of gripes as such and try to set up a meeting with Texas [the central office of the Company].

Jenkins and Paver thereafter spoke with their fellow employees and arranged a breakfast meeting at the "Country Kitchen, right by the shop." This meeting was held during late May 1977, and was attended by Jenkins and Paver and some five co-workers of the Alsip facility. Jenkins, as he testified, "started the meeting out" with his "list" of topics and "gripes." The employees present added to this "list." Subjects such as wages, hospitalization, maternity benefits, pay-time, hours

of work, safety sessions and "the pros and cons of a union" were discussed. At the conclusion of the meeting, Jenkins "told the employees that [he] would approach Al Spencer [the Company's Alsip branch manager] with the list and try to set up a meeting with somebody at Texas."

On the following day, Jenkins spoke with branch manager Spencer in Spencer's office. Jenkins recalled:

> [I] told Mr. Spencer that the employees got together and we made a list of gripes. And we'd like to talk with the [Company's] representative from Texas about our gripes and about the shop going union.

Spencer "said that he would get in touch with Texas and get back with" the employees. Thereafter, Jenkins again spoke with Spencer about this subject at a "hot dog stand" near the Alsip facility. Employees Paver and Paul Durham and foreman Kenneth Leone were also present during this discussion. Jenkins testified:

> I asked Mr. Spencer, had he heard anything concerning Texas sending somebody down. He said he knew somebody was coming but he didn't know who. He said, "if you guys push this union thing, Texas will end up shutting this shop down and I will lose the $3,000 I have got down on a house I am having built." I told Mr. Spencer that Texas couldn't shut a shop down * * * for employees wanting to go union. He said, "it's a Texas shop, they can if they want."[2]

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[2] Jenkins recalled that on the following day he again asked Spencer in the shop, "had he heard from Texas." Spencer replied, "no * * *. I hope you guys know what you are doing. They will shut the shop down and I will lose the money I got down on my home." Jenkins recalled a similar conversation with Spencer later that evening or on the following day.

About this same time, Jenkins, Paver and some three co-workers attended an employees' meeting at the Alsip shop. The meeting had been "called" by Louis Randolph, the Company's superintendent. According to Jenkins,

> Randolph said, "I guess you know George Harrison [the Company's vice president] is coming up to meet with you guys." He said, "if you push this Union thing * * * Texas will shut this shop down."

About June 3, 1977, Company vice president Harrison spoke to the Alsip employees in the shop. Jenkins recalled that "Harrison came out, introduced himsef and said, I understand you guys got some gripes you'd like to discuss." Jenkins responded, "Yes, * * * I had a list * * * that we had gotten together and made up." Harrison asked for the "list" and instructed Spencer to prepare a copy of the "list." See General Counsel's Exhibit 7. Jenkins then "started the meeting out" by discussing with Harrison his "list." During this discussion, as Jenkins testified,

> * * * I [Jenkins] brought [up] concerning the union. I asked, "Could we have a representative from a union come in and talk to Mr. Spencer concerning benefits and see if we could work out some type of program or give the Company a better idea * * * what we could get by having a union." At this time, Mr. Harrison said, "No, [he] couldn't allow that. [He would] have to get back with the stockholders and bring it up to them." * * * Harrison said, "What good would a union be any way." I [Jenkins] said, "Well, it would give us job security. It would help the Company in getting into some plants that wouldn't allow us * * * because we are non-union and it would hopefully help us get better benefits."

Harrison claimed that "there is more to it than that." Jenkins asked: "If this shop went union, what would Texas do"? Harrison replied: "They'd probably shut it

down." The meeting ended with Jenkins asking Harrison "three questions to take back to the stockholders" pertaining to union representation and increased benefits.

Subsequently, about June 10, 1977, Company vice president Robert Thompson spoke to the Alsip employees in the shop. As Jenkins testified, "I started the meeting out asking Mr. Thompson about the three questions that I had sent with Mr. Harrison to get answers for." Thompson responded that he had been advised by "his lawyers in Texas" against "bringing * * * a representative from a union in to talk to Al Spencer. Further, Jenkins recalled:

> At that time, I [Jenkins] told Mr. Thompson * * *, "When Mr. Harrison was up here, he [Harrison] said that if this shop went union, Texas would shut the shop down." And Mr. Thompson said, "Don't get me [Thompson] wrong. I am not totally against a union, but if this shop did go union, you could see how it would not run efficiently as it should and, therefore, yes, we probably would have to shut it down."

Thompson then asked Jenkins "why you would want a union anyway" and Jenkins cited "job security" and "benefits."

Employee Paver testified that he was employed by the Company from June 1975 through June 1976 and from February 14, 1977 through June 13, 1977. Paver recalled discussing a union with co-worker Jenkins and other Alsip employees "almost everyday from April until the time we were fired in June." During late May, Paver assisted Jenkins in arranging a meeting of the employees, in order to "make up a list of demands and try to get another union or present our list to the Company." Paver later participated in the employee meeting at the Country Kitchen restaurant.

About this time, during late May, as Paver further testified, branch manager Spencer "came up" to Paver at

work and the two engaged in "just regular chit-chat and happened to bring up a point about the union." Paver then commented to Spencer: "If we could get a union, it would be nice." Paver asked Spencer "what he thought about it." Spencer replied:

> He [Spencer] said he couldn't say at this time. But he said, "If we got a union, Texas would probably close this shop down."

About a day later, Paver, in the presence of co-worker Jenkins, was complaining to Spencer about a particular job. Paver stated: "If we had a union, it would take better care of these problems." Spencer replied that "we'd get more problems." Spencer noted: "I have some money down on a house and I would hate to be transferred and lose my money."

Paver recalled a further conversation with Spencer at a "hot dog stand" near the shop. Jenkins and other employees were present. Paver overheard Spencer state:

> he [Spencer] had some money down on a house and he didn't want to lose it. If we kept pushing this union deal, they'd probably have to shut the shop down.

Paver also recalled a conversation with foreman Leone about this same time. Leone, after taking a telephone call, apprised Paver:

> They gave me [Leone] the word. If I was caught collaborating with you on the union, I lose my job. What you guys do now I want no part of and I want to keep my nose clean.

Paver attended a portion of Harrison's meeting with the employees on or about June 3, 1977. Paver also attended the Thompson meeting with the employees on or about June 10, 1977. Paver recalled that co-worker Jenkins had asked Thompson: "What happens, you know, if we went with the union." Thompson replied:

> This isn't a threat. I want to make that perfectly clear. But if you people insist no going with the union and you got a union, we'd probably have to close this shop down.

Anthony Gazelle, a technician employed at Respondent's Alsip operation, recalled the efforts of co-workers Jenkins and Paver to unionize the shop. Gazelle recalled that about late May or early June 1977, he and branch manager Spencer had the following conversation while playing golf:

> Al [Spencer] said to me, he says, "Texas knows about this union you guys have been talking about." I said, "no." He said, "Do you know what Texas will do." I said, "no, I don't." He says, "well, they will transfer all salaried people, lay everybody on hourly off and shut the office down." I says, "why would they do that." He says, "Texas doesn't want unionists in the Company."

Spencer also apprised Gazelle: "I'm just telling you what they said. I don't want to see you guys doing anything you'd be sorry for later." About one week later, Gazelle, as he further testified, was called into Spencer's office. Spencer informed Gazelle: "I'm talking to you as a friend, not as your boss. I don't want to see you get involved in this union thing. You've got a good chance to move up on the Company. I don't want to see you fuck it up * * *."[3]

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[3] Gazelle attended the meeting of employees conducted by vice president Harrison. Gazelle recalled, *inter alia*, that co-worker Jenkins asked Harrision, "what would Texas do if we get a union in here." Harrison responded: "We'd probably close the shop down." Gazelle also attended the meeting of employees conducted by vice president Thompson. Gazelle recalled that Jenkins had asked Thompson, "what would Texas do if we got a union in here." Thompson responded: " * * * he didn't see how this could operate if it was a union * * *."

Paul Durham, employed by the Company as an assistant and, later, as a technician from January until August 1977, recalled that foreman Leone told him and co-worker Paver that "he [Leone] no longer could talk to us about the union, that his job would be in jeopardy." Durham also witnessed branch manager Spencer warn the employees at a "hot dog stand" that,

> I [Spencer] have $3000 on a new house that I am having built * * * [and] if we keep continuing this union business that Texas is going to close the shop and I'll lose my $3000.

Durham later witnessed superintendent Randolph state to the Alsip employees, "Harrison wanted to know what we were going to do about the union business and that Texas would definitely close the shop if we continued it." In addition, Durham witnessed vice president Harrison explain to co-worker Jenkins that "Texas would shut the shop down" if the employees "went union."

Robert Thompson, vice president of Respondent, admittedly spoke with the Alsip employees on or about June 9, 1977. He had seen the employees' "list of complaints or gripes." This "list" was discussed at the meeting. Thompson recalled: "Milt Jenkins had told me they had been talking to a union representative." They then discussed "the pros and cons of a union." According to Thompson:

> I thought from a business climate basis and efficiency of operation that the business could quite possibly suffer if it was unionized. I spoke to that, that I felt this was a possibility, not using it as a threat, that I was concerned that the branch operation would survive as a union operation.

Company vice president Harrison recalled that he spoke to the Alsip employees about June 1 and that he then reviewed the "list" of employee complaints. Harrison generally denied, *inter alia,* that he was asked by Jenkins what would happen if the shop were "organized" and

that he responded "that the plant would close down or mentioned the plant closing in any way."

Branch manager Spencer generally denied, *inter alia,* that vice president Harrison had told the Alsip employees during his meeting that "he was going to close down the shop if it went union." In addition, Spencer recalled a conversation with employees at a "hot dog stand" at which time the "pros and cons" of unionization were discussed. Jenkins then said, "we have got nothing to lose" and Spencer admittedly responded: "I have got $3000 to lose because I was buying a new house. That is all I remember of that conversation." Spencer further recalled a conversation with employees Jenkins and Paver at which time he said: " * * * do you remember old John Popp [a former manager], what he wanted to do, he wanted a union, and they would probably shut this place down." Spencer next recalled talking with employee Gazelle "regarding a union" during a golf game. Spencer could only "remember saying" that "some of the guys are talking about it" and he, Spencer, "really didn't know" what the Company "will do."[4]

B. The Company Discharges Employees Jenkins And Paver

Employee Jenkins testified that on Monday June 6, 1977, he and co-worker Paver went to the ECI refinery to investigate "a steam leak." The leak was on "a flange and heat exchanger" — the "exchanger was approximately 12 to 15 feet long * * *; it's like a large cylinder or pipe" and the "bottom is approximately three feet in

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[4] Superintendent Randolph was present when vice president Harrision addressed the Alsip employees. Randolph was asked if Harrison had said: "Texas would close down the shop * * *." Randolph's response was: "I don't remember him saying that" — "I never heard him say that." Randolph generally denied telling the employees that the Company was going to close the shop if it went union.

diameter." Jenkins was the assistant technician assigned to this job. Paver was the technician. Jenkins recalled that Paver examined the leak and noted that "there is a weld down here on this flange" and if "we went with a tongue seal [a common form of clamp used to stop such a leak] it could cause us problems." Consequently, Paver wanted to "use packing instead" as a seal. Paver determined that,

> if we went with packing, we could go on the outside of the weld and we could have a 360 [degree] seal on both flanges all the way around. And, we will keep the tongue, except we'll take off a quarter of an inch off the measurement or thereabouts. And we will just use the tongue for taking up space.

Jenkins agreed with Paver. The two employees then made their measurements and filled out a Company data sheet. See General Counsel's Exhibit 8. Jenkins acknowledged that, in filling out the data sheet (General Counsel's Exhibit 8), the employees recorded the "gap between the head of the flanges" as 3.5 inches although the "exact measurement" of this gap was approximately 3.75 inches. Paver then "took the data sheet and called the information into Texas," where the Company would prepare the clamp.

A few days later, Jenkins apprised foreman Leone that "the clamp Texas is sending up has a tongue seal on it. We ordered it with packing. * * * The tongue seal won't work because we took a quarter of an inch off of it." Leone said, "wait until it comes in and see what happens." Later, the next day, Jenkins similarly informed branch manager Spencer "that the clamp Texas is sending has a tongue seal on it. * * * It won't work. * * * We ordered it with packing and we took a quarter of an inch off that tongue, and there is no way that tongue will seal it." Spencer replied, " * * * it's already been made and it's on its way. We will have to see what happens."

On Saturday June 11, the clamp arrived from Texas. As Jenkins testified, "it was a tongue seal clamp with no packing." The two employees took the clamp to the ECI job and attempted for over 12 hours "to get this clamp to work"; however, "it didn't work." Paver then told foreman Leone,

> We can't get it sealed. We have tried everything we could think of. It's not the way we ordered it. I don't know what to say. We just can't get it stopped.

Leone responded: "Don't worry about it. Everybody makes mistakes."

On Monday June 13, Company superintendent Randolph summoned employees Jenkins and Paver into branch manager Spencer's office. Spencer was not there. Randolph informed the two employees that "we can't have * * * big mistakes like that and Al [Spencer] and I [Randolph] talked it over and decided to let you two go." Jenkins argued that Randolph had made "many mistakes" and had not been fired. Randolph responded, "that's the way it is." Previously, Jenkins had never received a reprimand or any criticism of his work. See General Counsel's Exhibits 5 and 6, the Company's progress reports issued to Jenkins on May 3 and June 13, 1977, respectively.

Employee Paver similarly testified that after examining the leak at the ECI job on June 6, he stated to Jenkins, "why don't we put a tongue in and use it to tongue the gap" and also use a "packing seal." Jenkins agreed. Paver had ordered about four or five clamps with "packing" in the past; however, as Paver acknowledged,

> * * * I never asked for a clamp made this way because usually when I come up to a job and look at a flange it might be mismatched. I never saw a weld on a flange like that. * * * The way I understood it, it was my job to look at it and see what to do with it.

Paver then called in his order to Texas. Paver, as he further testified, told the Texas representative on the

telephone that he had a DS 100 sheet — a data supply sheet (General Counsel's Exhibit 8) — and,

> we started from the top of the sheet and we'd go down giving the information that we had.

Paver recalled:

> When we got to the gap, I gave him this 3-½ [inch] measurement. And he says, "Where did you get this 3-½? What did you use to measure this?" I said, "my veneers. I will explain this to you in a moment." And I went down and explained this obstruction.

Paver, after explaining the obstruction to the Texas representative on the telephone, stated: "I would like to go with packing on this." Paver was then asked, "Where do you come up with this 3-½? What did you use to measure?" Paver responded:

> "I used my veneer. I didn't want to use a tongue as a [seal]." He [the Texas representative] said, "What is this packing. I don't understand." Then, I explained the weld again. And he said, "Well, all right." He goes, "I'll see what we can do with it." And he hung up and I hung up.[5]

Thereafter, as Paver further testified, on Saturday June 11, Paver and Jenkins picked up the clamp for the ECI job. Paver observed, "This isn't going to work" — there was no "packing" on the clamp and "it wasn't quite wide enough." In brief, the tongue was cut to a 3½ inch gap as ordered; however, without the packing, it was too

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[5] The data sheet which was filled out by the employees at the ECI job (General Counsel's Exhibit 8) states under "instructions for field":

* * *

> ¼ of in from gap on flange 2 (¾ inch wide and ¼ weld high) (packing).

* * *

Paver recalled that he "turned [the data sheet] in" at the Alsip office after leaving the ECI Job.

narrow to hold in the seal. Repeated efforts to install the clamp and seal the leak were unsuccessful. Foreman Leone later visited the ECI job. Paver explained to Leone that "they didn't make the clamp the way I asked them to." Leone responded: "Don't worry about it. Just go order another clamp." Paver also reported the incident to branch manager Spencer on the telephone. Spencer agreed that a new clamp should be ordered.

Paver recalled that on Monday June 13, Jenkins and he were summarily terminated by Randolph. Paver acknowledged that he had been instructed by management to fill out the data sheet forms accurately and that the ECI data sheet form shows the "gap" at 3.5 inches instead of 3.75 inches.[6]

Employee Gazelle testified that he spoke with manager Spencer on June 13 in Spencer's office. Co-worker Paul Durham was also present. Gazelle and Durham then asked Spencer why Jenkins and Paver were fired. Gazelle asked, "how come Milton [Jenkins] was fired. He's just an assistant. He doesn't have any final say-so in the measuring of a clamp. That's the technician's final decision on what he feels is the best way to seal it." Spencer replied:

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[6] Paver also explained that during his last period of employment with the Company (February 14 through June 13, 1977), he had not been reprimanded or warned by the Employer about his work. (See General Counsel's Exhibit 11, Paver's progress report dated May 31, 1977.) In addition, Paver acknowledged that he had been terminated by former Company manager Bill Buchardt in June 1976 "because I left the job leaking." Paver explained the incident. Later, Buchardt was fired by the Company and manager Spencer then rehired Paver. Paver was then told: "If you want, you got the job because we [Spencer and Steve Stewart] know you got the shaft."

> he [Spencer] had talked to Texas, and when Texas asked who the assistant on the job was, and he had told him Milt Jenkins, he said get rid of him too.

Spencer assured Gazelle and Durham: "Don't worry. Nobody else will be fired on account of this." Gazelle acknowledged that he had in the past incorrectly measured a clamp; the clamp did not fit; and he was not fired or repremanded for his mistake. Gazelle also noted that in late 1976 he had ordered a clamp with a tingue and packing seal and Texas "agreed." Gazelle, however, accurately recorded the "gap" for this "tongue and packing seal" clamp.

Employee Durham testified that he was at the ECI job on Saturday June 11. Durham witnessed co-worker Paver explain to foreman Leone "that the clamp they were working on wouldn't fit." Leone assured Paver: "Don't worry about it. We all make mistakes." Later, Leone stated to Durham:

> he [Leone] had just called Al Spencer. Leone told me [Durham] that Al Spencer had said not to worry about it. Tell Larry not to worry about it. Just take another set of measurements and send them to Texas so we can get a clamp.

Durham also witnessed Leone relate this information to Paver. "Spencer said not to worry about it. Just take another set of measurements and get it to Texas." And, Durham recalled that Spencer later assured Gazelle and himself: "Don't worry about it. Nobody else will be fired for the same thing."

Branch manager Spencer testified that on Saturday June 11, he received a telephone call from foreman Leone concerning the ECI job. Leone then informed Spencer that Paver had admitted that "he [Paver] had things to do that night and had cut a quarter inch off to make the job easier * * *." Spencer then told Leone to have Paver "in the office Monday morning." Spencer further testified that he received a telephone call from Paver that same day. Spencer recalled:

> He [Paver] called me up and told me the clamp didn't fit. Basically that it was his fault. Can't remember the exact words now. He admitted it was his fault and asked me what I was going to do. I don't remember if he asked me whether I was going to fire him or not. I said, "We are not going to do anything right now."

Spencer, as he further testified, telephoned vice president Harrison on Sunday June 12 and apprised Harrison that a technician and his assistant had "cut one quarter inch off a [tongue] of a clamp to make the job easier for themselves and that the clamp did not fit." Harrison assertedly left the "decision" as to "what * * * to do" to Spencer. Spencer claimed that he did not mention the names of the employees involved to Harrison. Spencer subsequently telephoned superintendent Randolph during late sunday and

> told him [Randolph] I [Spencer] wasn't going to be in the office Monday morning, * * * I wanted him to discharge Mr. Paver and Mr. Jenkins.

Spencer assertedly terminated both Paver and Jenkins because "they were not employed as engineers and they designed this clamp themselves in the field which is not their job * * *." Spencer acknowledged that clamps have been "mismeasured" by employees in the past and the employees involved were not terminated by the Company.

Company vice president Harrison recalled his conversation with Spencer on Sunday June 12. According to Harrison, Spencer then told Harrison that two employees had "mismeasured" a clamp; the "clamp doesn't fit" and "the technician said they did it on purpose." Harrison responded that "we can't tolerate that." Harrison further testified in part:

> After * * * I [Harrison] told him [Spencer] to get rid of them, * * * [he] said, "It's Larry Paver and Milt Jenkins." I said, "we can't help it; with this Union talk.

• • •

"With this Union talk, can we do that."

• • •

I said, "Al, if there is a good reason regardless who it is, it's my feeling that something should be done. And we cannot tolerate this."

Harrison added:

I said, "well you know what has to be done." That's before I knew who the individuals were.

Superintendent Randolph acknowledged that some ten employees have made mistakes in measuring clamps; most of the clamps could not be used; and none of the employees involved were discharged. Randolph further acknowledged that he had seen the data sheet prepared by Paver and Jenkins for the ECI clamp "prior to the installation of the clamp."

Foreman Leone claimed that on Saturday June 11, employee Paver made the following admission to him:

"Well, I [Paver] had a few things to do today, and I didn't feel like working on this all day long; so when the measurements came in, I took a quarter inch off the measurements."

According to Leone, Jenkins also admitted that he "knew of the situation." Jenkins assertedly stated to Leone:

"who am I [Jenkins] to override a technician. I am the assistant tech."

Leone later spoke with Spencer. Leone denied that either Jenkins or Paver had told him prior to Saturday June 11 that they had reason to believe that the ECI clamp would not seal the leak. Leone also denied that on June 11 Paver had said that the clamp was "not the way we ordered it." Leone, however, could not "remember" saying

to Paver on June 11: "* * * don't worry about it, we all make mistakes." Further, Leone did not know when the initial ECI clamp had been ordered by Paver and Jenkins. Leone agreed that on the day when this clamp was ordered, there was no way of determining exactly when the clamp would be delivered from Texas.

Robert Thompson, an officer of Respondent, explained that it is the engineering personnel in the Texas office who "have the ultimate decision to decide how the job should be done. It is not decided in the field" and the "most critical responsibility" of a field technician is "to make accurate measurements." Thompson claimed that the cost of the new ECI clamp was about $3700.

William C. Grace, employed by the Company as a supervisor of engineering in its Texas office, testified that Respondent's Exhibit 2 (sheet 4) is the data sheet which he prepared for the ECI clamp in question on June 7, 1977. According to Grace, "I am the one who took the call and filled it out." Grace claimed that no request had been made for an "unusual sort of clamp." Grace, in any event, would not have approved any request by a technician for a "special clamp" here. However, General Counsel's Exhibit 8, the data sheet report of Paver and Jenkins, indicates that this order was made on June 6 and not on June 7, as stated in Grace's report. Further, Grace, after being shown General Counsel's Exhibit 8, testified in part:

> I recall a discussion with the technician in regards to obstruction, and the request for packing, and I explained to him there — with the obstruction, the flange clamp, the tongue clamp would be better because of the kind of close on the packing. This is not the exact words, but the discussion.
>
> * * *
>
> Well, sir, we discussed the data, and he explained the obstruction, the weld, and I remember we discussed packing, and we discussed the weld in trying to close on the packing. We discussed that it would

be better to go with the flange clamp because of the gap, no mismatch, and it's easier just to machine the flange to the counter bore larger to get over the weld.

I credit the testimony of employees Jenkins, Paver, Gazelle and Durham as detailed *supra*. Their testimony is in significant part mutually corroborative. Their testimony is also substantiated by testimony of vice president Thompson, vice president Harrison, branch manager Spencer, superintendent Randolph, foreman Leone and supervisor Grace. And, relying upon the demeanor of the witnesses, I am persuaded on this record that employees Jenkins Paver, Gazelle and Durham have given a complete and credible account of the above sequence of events. Insofar as the testimony of Thompon, Harrison, Spencer, Randolph Leone and Grace differs with the above testimony of Jenkins, Paver, Gazelle and Durham, I find the testimony of the latter to be more complete, accurate and trustworthy. In particular, as discussed below. I am persuaded here that Spencer, Randolph, Harrison and Thompson threatened the employees with a shutdown of operations at Alsip and with other reprisals if the employees exercised their rights to union representation. Further, as discussed below, I am persuaded here that the real reason for the summary discharge of employees Paver and Jenkins on Monday June 13 was their unionization activities. I do not credit foreman Leone's assertion that Paver admitted to him on Saturday June 11 that he, Paver, "had a few things to do today, and didn't feel like working on this all day long, so when the measurements came in [Paver] took a quarter inch off * ** ." Indeed, Leone acknowledged that neither Paver nor Jenkins could have known on the day they made their measurements, Monday June 6, when the clamp in fact would be delivered to the job site. Instead, I am persuaded here that Management has seized upon this error on the part of the two employees as an excuse to discharge them and thereby discourage employee organizational activities at the Alsip facility.

Discussion

Respondent argues that it discharged employees Jenkins and Paver solely for lawful reasons. The question presented is whether Respondent, in discharging the two employees on June 13, 1977, was motivated by an unlawful purpose. For, under settled law, "the Board is not compelled to accept the Employer's statement" of the reason for an employees' discharge "when there is reasonable cause for believing that the ground put forward by the Employer was not the true one, and that the real reason was the Employer's dissatisfaction with the employee's" union or protected, concerned activities. *Great Atlantic and Pacific Tea Co.* v. *N.L.R.B.*, 354 F.2d 707, 709 (C.A. 5, 1966). And, a discharge motivated only in part by an unlawful purpose is similarly illegal. *J. P. Stevens & Co.* v. *N.L.R.B.*, 380 F.2d 292, 300 (C.A. 2, 1967), cert. den. 389 U.S. 1005.

On the credited evidence of record as recited *supra*, I find and conclude that Respondent, in summarily firing employees Jenkins and Paver on June 13, 1977, was motivated at least in part by their union and related protected concerted activities. Thus, Jenkins and Paver were the chief union protagonists at the Alsip facility. They had arranged for a meeting of their co-workers to prepare a list of "gripes." They had attempted to secure the assistance of a union in their organizational efforts. Jenkins had apprised branch manager Spencer about the employees' "list of gripes" and that "we'd like to talk with the [Company's] representative from Texas about our gripes and about the shop going union." Branch manager Spencer thereafter repeatedly warned the employees: " * * * if you guys push this union thing, Texas will end up shutting this shop down * * *." Superintendent Randolph similarly warned the employees that vice president Harrison "is coming to meet with you guys" and "if you push this union thing * * * Texas will shut this shop down." Indeed, branch manager Spencer admonished em-

ployee Gazelle: " • • • they will transfer all salaried people, lay everybody on hourly off and shut the office down • • •. Texas doesn't want unionists in the Company. • • • I don't want to see you guys doing anything you'd be sorry for later • • •." Subsequently, Spencer again warned Gazelle "as a friend" not to get "involved in this union thing • • •." Spencer made it clear to Gazelle, " • • • you've got a good chance to move up • • • I don't want to see you fuck it up • • •." And, on or about June 3, Company vice president Harrison, in discussing employee Jenkins' list of "gripes" at the Alsip shop, confirmed to the assembled employees that "they'd probably shut [the facility] down" if the employees chose union representation. Thereafter, about June 10, Company vice president Thompson also warned the assembled Alsip employees that " • • • if this shop did go union, you could see how it would not run efficiently as it should and, therefore, yes, we probably would have to shut it down."

On the following Monday morning, June 13, employees Jenkins and Paver were fired by superintendent Randolph because, as foreman Leone wrote on the employees' progress reports (General Counsel's Exhibits 4 and 6):

> At this time, a mistake that was uncalled for and that never should have been, a ¼ inch subtraction off a tongue clamp.
>
> • • •
>
> Larry [Paver] was doing a fine job as a tech, but when it came down to the end, he knew he was wrong in what he had done, but too late to change.
>
> • • •
>
> At this time, Milt [Jenkins] had gone along with a tech to subtract ¼ inch off the width of a tongue clamp which caused a misfit.
>
> • • •
>
> Milt [Jenkins] would have made a good tech, but we felt that Milt should have spoke up at the time knowing this was not the right thing to do.

* * *

In the past, some ten Alsip employees had made mistakes in measuring piping for clamps. In some cases, the clamps could not be used. Nevertheless, Management had not discharged or apparently even reprimanded the employees involved.

It is true, as Respondent claims, that employees Paver and Jenkins made a mistake at the ECI job. They made, in my view, a mistake in judgment by not sufficiently and clearly apprising their superiors of their improvisation. However, assessed in the context of Management's strong opposition to the employees' union and related protected concerted efforts, the willingness of Management to tolerate mistakes in the past, the good work records of these two employees, and the timing of their terminations, I find and conclude that the real reason for their discharges was their union and related protected concerted activities. I find and conclude that Management seized upon this mistake as an excuse to deter and chill the unionization and related protected concerted activities at the Alsip shop. Respondent thereby violated Section 8(a)(3) and (1) of the Act.

Further, I find and conclude that branch manager Spencer's and superintendent Randolph's warnings to the employees to the effect that, "if you push this union thing * * * Texas will shut this shop down," plainly tended to impede employee Section 7 activities and therefore violated Section 8(a)(1) of the Act. In like vein, vice president Harrison's and vice president Thompson's warnings to the Alsip employees to the effect that, " * * * we probably would have to shut it down" if the employees chose union representation, were proscribed threats of reprisal. These statements by upper Management were not "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control * * *."

See, *e.g., N.L.R.B.* v. *Gissel Packing Co.,* 395 U.S. 575, 616-620 (1969).[7] Finally, branch manager Spencer's warning to employee Gazelle that the Employer would transfer and lay off employees if they persisted in this unionization effort and Spencer's related admonishment to the employee not "to get involved" because "you'd be sorry" or jeopardize "a good chance to move up," also tended to inhibit employee organizational activities, in violation of Section 8(a)(1) of the Act.

I find and conclude that Respondent, by the foregoing conduct, violated Section 8(a)(1) and (3) of the Act as alleged.

Conclusions Of Law

1. Respondent Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by threatening its employees with layoff, plant closure, loss of promotion and other reprisals if they chose union representation.

3. Respondent violated Section 8(a)(3) and (1) of the Act by terminating employees Vincent Lawrence Paver and Milton Louis Jenkins, and thereafter refusing to reinstate them, because they had engaged in union and related protected concerted activities.

4. The unfair labor practices found herein effect commerce within the meaning of Section 2(6) and (7) of the Act.

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[7] And see, *Surprenant Mfg. Co.* v. *N.L.R.B.,* 341 F.2d 756, 761 (C.A. 6, 1965); *N.L.R.B.* v. *Miller,* 341 F.2d 870, 873 (C.A. 2, 1965); *Int'l Union of Electrical Workers* v. *N.L.R.B.,* 289 F.2d 757, 763 (C.A.D.C., 1960); *N.L.R.B.* v. *Kolmar Laboratories, Inc.,* 387 F.2d 833, 836-838 (C.A. 7, 1967); *N.L.R.B.* v. *Louisiana Mfg. Co.,* 374 F.2d 696, 702-703 (C.A. 8, 1967).

Remedy

Having found that Respondent engaged in certain unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. And, as the unfair labor practices committed by the Respondent strike at the very core of employee rights safeguarded by the Act, I recommend that Respondent cease and desist from in any other manner infringing upon rights guaranteed employees in Section 7 of the Act.

It has been found that Respondent, in violation of Section 8(a)(3) and (1) of the Act, unlawfully terminated employees Paver and Jenkins on June 13, 1977. It will therefore be recommended that Respondent offer to both employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered by reason of their unlawful terminations, by payment to them of a sum of money equal to that which they normally would have earned from the date of Respondent's discrimination to the date of Respondent's offer of reinstatement, less net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB No. 117 (1977).[8] Further, it will be recommended that Respondent preserve and make available to the Board, upon request, all payroll records and reports, and all other records necessary and useful to determine the amount of backpay due and the rights of reinstatement under the terms of these recommendations. Respondent will also be directed to post the attached notice.

---

[8] See, generally, *Isis Plumbing and Heating Co.*, 138 NLRB 716 (1962).

ORDER[9]

Upon the foregoing findings of fact and conclusions of law, and upon the entire record of the case, Respondent Leak Repairs Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with layoff, plant closure, loss of promotion and other reprisals if they chose union representation;

(b) Discouraging membership in any labor organization by discriminatorily discharging any of its employees or in any other manner discriminating against them with respect to their hire or tenure of employment or any term or conditions of employment;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer employees Vincent Lawrence Paver and Milton Louis Jenkins immediate and full reinstatement to their former jobs or to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings in the manner set forth in this Decision;

(b) Preserve and make available to the Board or its agents all payroll and other records, as set forth in this Decision;

---

[9] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.46 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Post at its offices and facility in Alsip, Illinois, copies of the notice attached hereto as "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 13, shall after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Decision what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. November 24, 1978.

/s/ Frank H. Itkin
Administrative Law Judge

Form NLRB—4727
(9—69)

NOTICE TO EMPLOYEES

Posted by order of the National Labor Ralations Board

An agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that LEAKS REPAIRS, INC., has violated the National Labor Relations Act and has ordered us to post this notice. We therefore notify you that:

---

[10] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

WE WILL NOT threaten our employees with layoff, plant closure, loss of promotion or other reprisals if they chose union representation.

WE WILL NOT discourage membership in any labor organization by discriminatorily discharging any of our employees or in any other manner discriminating against them with respect to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL offer VINCENT LAWRENCE PAVER and MILTON LOUIS JENKINS immediate and full reinstatement to their former jobs or to substantially equivalent positions without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings, as provided in the Board's Decision and Order.

LEAK REPAIRS, INC.
(Employer)

Dated: ..... By: .....
(Representative (Title)

This is an official notice and must not be defaced by anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Bldg., 219 S Dearborn Street, Chicago, Illinois 60604 (Tel. No. [312] 353-7597).

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

(Argued April 3, 1980)

May 21, 1980

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. William J. Bauer, Circuit Judge

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

No. 79-1678

vs.

LEAK REPAIRS, INC.,

Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board.

ORDER

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order finding that the respondent, Leak Repairs, Inc., violated Section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) by threatening its employees with plant closure, layoff, loss of promotion, and other reprisals if they chose union representation. The Board further found that the respondent violated Sections 8(a)(1) and (3) of the Act by discharging employees Vincent Paver and Milton Jenkins because of their union activities. The Board's order required, *inter alia,* that the respondent cease and desist from the unfair labor practices found and affirmatively required the respondent to reinstate the discharged employees. For the reasons set forth below, the petition for enforcement is granted.

I

The respondent does not contest the Board's finding that it committed an unfair labor practice under Section 8(a)(1) of the Act by threatening its employees with certain sanctions if they chose union representation. Accordingly, the Board is entitled to summary enforcement with respect to this finding. *See, e.g., Dreis & Srump Mfg. Co., Inc.* v. *N.L.R.B.*, 544 F.2d 320, 325 (1976).

II

Respondent does challenge the Board's finding that it violated Sections 8(a)(1) and (3) of the Act in discharging employees Paver and Jenkins for their union activities on the ground that they were discharged for cause and not on the basis of an impermissible discriminatory motive. Respondent concedes that the discharge of Paver and Jenkins violated Sections 8(a)(1) and (3) of the Act if it was motivated even in part by antiunion considerations. Respondent contends, however, that a legitimate reason existed for their discharges—their failure to report the accurate measurements for the refinery leak. Consequently, it argues the burden rests with the Board to establish that the discharges would not have resulted from that purportedly legitimate basis alone. This Court has never endorsed such a "but for" test, *Chicago Magnesium Castings Co.* v. *N.L.R.B.*, 612 F.2d 1028, 1034 (7th Cir. 1980), and we find the cases cited by respondent in support of such a standard to be inapposite. Rather, the standard adopted by this Court focuses on the controlling issue under Section 8(a)(3): the actual motivation for the discharge in question. *W.W. Grainger, Inc.* v. *N.L.R.B.*, 582 F.2d 1118, 1120 (7th Cir. 1978). Thus, where substantial evidence supports the Board's finding that a discharge was motivated —even in part—by antiunion considerations, the mere assertion that a "legitimate reason" for the discharge "exists" is not enough; the employer must demonntrate that the discharge in question was "predicated solely on

these grounds and not by a desire to discourage protected activity'' *Jays Foods, Inc.* v. *N.L.R.B.*, 573 F.2d 438, 443 (7th Cir. 1978), cert. denied, 439 U.S. 259 (1978), quoting *N.L.R.B. v. Fairview Hospital,* 443 F.2d 1217, 1219 (7th Cir. 1971).

The central inquiry here is one of fact: whether the discharges of Paver and Jenkins were motivated by antiunion conniderations. *N.L.R.B.* v. *Gogin,* 575 F.2d 596, 601 (7th Cir. 1978). That inquiry is properly charged, in the first instance, to the Board, and, where there is substantial record support for the Board's finding, the reviewing court "may not displace the Board's choice between two fairly conflicting views [of the evidence], even though the court would justifiably have made a different choice had the matter been before it *de novo.*'' *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488 (1951); *Electri-Flex Co.* v. *N.L.R.B.*, 570 F.2d 1327, 1331 (7th Cir. 1978). Applying the principles cited above to the facts of this case, we conclude that there is substantial evidence on the record as a whole to support the finding of the Board that the discharges of Paver and Jenkins were discriminatorily motivated.

III

The record reveals that Paver and Jenkins were the principal union protagonists at the respondent's facility in Alsip, Illinois. During April and May 1977, they actively promoted unionization among their fellow employees, attempted to enlist the organizational assistance of local unions, and arranged a meeting at which they and other employees compiled a list of grievances and discussed the prospects for unionization. Thereafter, Paver and Jenkins openly discussed their union support with the manager of the Alsip facility and repeatedly requested that management meet with a union representative to discuss employee grievances. Subsequently, on June 3, 1977 the respondent sent a management representative from its corporate headquarters in Texas to meet with the Alsip employees. At that meeting, Jenkins acted

as the spokesman for the employees, served the management representative with a list of the employees' grievances, defended the notion of union representation and again urged management to meet with a union representative. On Monday, June 6, 1977, Paver and Jenkins were sent to Engineering Cooperative, Inc., a nearby refinery, to repair a leaking heat exchanger. Upon inspection of the leak, Paver and Jenkins determined that an improvised clamping apparatus would correct the problem and telephoned appropriate specifications for such a clamp to the respondents' engineering department at its Texas facility. On Friday, June 10, 1977, another management representative met with the employees of the Alsip facility and Jenkins again pressed for the respondent's position regarding unionization. The next day, Saturday, the clamp which had been ordered for the refinery leak arrived. Upon inspection, Paver and Jenkins discovered that a packing component was missing from the order, but nevertheless, attempted, without success after twelve hours, to install the clamp. They informed their foreman and manager of the Alsip facility of the situation and were advised to simply order another clamp. The following Monday morning, without prior warning, Paver and Jenkins were summariy discharged from employment.

As the Board found, this precipitous action—coming, as it did, shortly after the respondent became aware of their outspoken prounion sentiments—provides strong support for the Board's finding of antiunion discrimination, for "'[t]he abruptness of a discharge and its timing are persuasive evidence as to motivation.'" *N.L.R.B.* v. *Sutherland Lumber Co.*, 452 F.2d 67, 69 (7th Cir. 1971), *quoting N.L.R.B.* v. *Montgomery Ward & Co.*, 242 F.2d 497, 502 (2d Cir. 1957), *cert. denied*, 355 U.S. 829 (1957). Moreover, the record amply demonstrates, and the respondent concedes, the existence of antiunion animus on the part of its management personnel. Once apprised of employee interest in union representation, these officials repeatedly threatened Paver, Jenkins and the other em-

ployees of its Alsip facility with plant closure and other reprisals in order to blunt their organizational thrust. These threats—and the antiunion attitude they manifest—were "properly and highly significant factors" for the Board to evaluate in determining that the discharges were motivated by the respondent's opposition to unionization. *N.L.R.B.* v. *Tom Wood Pontiac, Inc.*, 447 F.2d 383, 386 (7th Cir. 1971).

Finally, the failure of the respondent's explanation for the discharge to withstand scrutiny itself supports the Board's finding. The respondent contends here, as it did before the Board, that the discharges were justified because Paver and Jenkins admitted at the hearing before the Administrative Law Judge that they had knowingly relayed an incorrect measurement for the clamp to the respondent's engineers in Texas. However, it is far from clear that such a mistake—even if actually known at the date of discharge to have been deliberate—would have resulted in the loss of employment, particularly in light of their exemplary work records. It is true, as the Board found, that Paver and Jenkins made "a mistake in judgment by not sufficiently and clearly apprising their superiors of their improvisation." But, as the Board noted, the respondent had never discharged any other employee for making mistakes; indeed, shortly after the discharge of Paver and Jenkins, the manager of the Alsip facility assured employees Gazelle and Durham that "[n]obody else will be fired for the same thing." These facts, as well as the conflicting accounts of the discharges given by the respondent's witnesses which were descredited by the Board, provide strong support for the Board's finding that antiunion considerations—and not the problems with the clamp—moved the respondent to discharge Paver and Jenkins. *N.L.R.B.* v. *Henry Colder Co.*, 416 F.2d 750, 753 (7th Cir. 1969).

Accordingly, the Board's determination that the respondent "seized upon this mistake as an excuse to deter and

chill the unionization activities'' at its Alsip facility was clearly warranted. We therefore conclude that the Board's finding that the respondent violated Sections 8(a)(1) and (3) of the Act in discharging Paver and Jenkins is supported by substantial record evidence. The petition for enforcement is granted and the Clerk of this Court is directed to enter an appropriate decree.

Enforced.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LEAK REPAIRS, INC.,
Respondent.

No. 79-1678

JUDGMENT

Before: Cummings, Sprecher and Bauer, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of an order issued by it against Respondent, Leak Repairs, Inc., its officers, agents, successors and assigns on March 20, 1979. The Court heard argument of respective counsel on April 3, 1980, and has considered the briefs and transcript of the record filed in this cause. On May 21, 1980, the Court being fully advised in the premises, handed down its order granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Respondent, Leak Repairs, Inc., its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

/s/ William J. Bauer
Judge, United States Court of Appeals for the Seventh Circuit

Supreme Court, U. S.
FILED
SEP 23 1980
MICHAEL RODAK, JR., CLERK

No. 80-89

In the
Supreme Court of the United States

October Term, 1980

LEAK REPAIRS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SUPPLEMENTAL BRIEF BECAUSE OF INTERVENING LABOR BOARD DECISION CONCEDING THE MAJOR ISSUE IN THIS CASE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LEAK REPAIRS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

SUPPLEMENTAL BRIEF BECAUSE OF INTERVENING LABOR BOARD DECISION CONCEDING THE MAJOR ISSUE IN THIS CASE

A version (some of which is incorporated herein) of this Brief calling the Court's attention to the Board's intervening *Wright Line* decision was at the printers before we received (September 19) the Supplemental Brief of the National Labor Relations Board. The Board seemingly is so reluctant to have this Court pronounce the applicability of *Mt. Healthy* to Labor Board cases that it has filed a brief which, in our judgment, seriously misstates the proceedings below and, as we read the Brief, takes the view that if the Board simply labels serious misconduct as a "pretext" for discharge the *Mt. Healthy* discipline need not be applied.

If this is what the Board's *Wright Line* decision really says, or is the way the Board will apply *Mt. Healthy,* it is apparent it would mean that the Board paid mere lip service to *Mt. Healthy* in *Wright Line* and feels free to avoid the *Mt. Healthy* test by labeling the employer's

reason of misconduct simply as a "pretext" which need not be subjected to the *Mt. Healthy* analysis. All the more reason for definitive action by this Court.

An examination of the Supplement's footnote 2 (Supp. p. 2) and *Wright Line's* footnote 4 (Supp. 4a) and the 7th Circuit's opinion shows conflict which should be resolved either by plenary hearing or a remand of the case to the 7th Circuit to reconsider in the light of *Mt. Healthy* which that Court specifically rejected.

At page 3 of the Supplemental Brief the appellate lawyers proclaim that:

> "• • • application of the *Mt. Healthy* test to the facts here would not change the Board's ultimate conclusion in this case."

That is not for appellate lawyers to say.

The simple facts are that there was no showing that ever before had technical employees lied to Petitioner's Engineering Department about a crucial minute measurement—a lie that cost Petitioner $3,700. And regardless of whether or not lawyers think the Board would, or would not, reach the same result upon reconsideration, they do not speculate what the 7th Circuit would do.

Nor did the Court of Appeals find, as counsel assert, that Petitioner "utterly failed" in its attempt to show that Paver and Jenkins would have been fired even in the absence of union considerations. The 7th Circuit never viewed the case in that light. It viewed it from its "tainted motive" doctrine and as to the weight of the evidence simply said:

> "• • • it is far from *clear* that such a mistake, even if actually known at the date of discharge, to have been deliberate, would have resulted in the loss of employment." (Pet. 33a, emphasis supplied.)

The day after it filed its Brief in Opposition here (August 27, 1980), the Labor Board decided *Wright Line, a division of Wright Line, Inc. and Bernard R. Lameroux,* 251 NLRB No. 150 (See Appendix to Boadd's Supplemental Br.), holding it would thereafter "examine causality in [§8(a)(3) Labor Act] cases through an analysis *akin* to that used by the Supreme Court" in *Mt. Healthy.* (Emphasis supplied.) This became public knowledge through the *Daily Labor Report* of September 11, 1980 (page D-1).[1]

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[1] The chronology of the Board's resistance to and final acceptance of *Mt. Healthy* is interesting: This Court decided *Mt. Healthy* January 11, 1977. The First Circuit applied it to Labor Act cases on March 18, 1977 in *Colletti's Furniture, Inc.* v. *NLRB,* 550 F.2d 1292. But the Board neither sought certiorari nor thereafter applied *Mt. Healthy.* Two years later, March 14, 1979, a different panel, save for one judge, of the First Circuit tartly upbraided the Board in *NLRB* v. *Eastern Smelting and Refining Co.,* 598 F.2d 666. On February 8, 1980 at a National Labor Relations Board regional seminar, Robert E. Allen, Labor Board Office of Appeals Director, admitted that the Board continued to apply the in-part test of causation while the First and Second Circuits insisted upon the *Mt. Healthy* standard, and that "it seems obvious that we have got a Supreme Court issue. . . . (*Daily Labor Report,* February 12, 1980, p. A-4). The Petition for Certiorari in the case at bar was filed July 21, 1980 and mailed to the Board and the Solicitor General that day. The Board's Brief in Opposition, seeking to avoid the *Mt. Healthy* issue, was filed here August 26, 1980. The *Wright Line* decision was issued by the Board the following day, August 27. It is obvious that the finely honed *Wright Line* decision was many days, probably several weeks, in preparation and that the Board and its counsel undoubtedly knew about it when the Brief in Opposition was filed here. It is a reasonable speculation that the Petition brought the entire matter to a head.

In short, in *Wright Line* the Board conceded: (a) that "disagreement and controversy are rampant" among the circuits as to the proper test of causation in so-called "mixed motive" cases under §8(a)(3); and (b) that the proper test, or discipline, to be applied in deciding such cases is the *Mt. Healthy* test formulated by this Court. The latter concession admits the core contention of the Petition for Certiorari.[2]

The conflicts between the courts of appeal are not going to be settled by an administrative agency decision as to either cases now pending or those which will arise in the future in which a disappointed charging party who is not satisfied with a Board decision denying him reinstatement can take an appeal under §10(f) of the Labor Act.

And there are other difficulties: The 7th Circuit has a rule (Circuit Rule 16(e)) which provides that:

> "A proposed opinion aproved by a panel of this Court adopting a position which would overrule a prior decision of this Court * * * shall not be published unless it is first circulated among the active members of this Court and a majority of them do not vote to rehear in banc the decision of whether the position should be adopted."

---

[2] The Brief in Opposition seeks to avoid the issue by assuming the point in question and asserting that the respondent's stated reason for firing the employees because they had given a deliberately false report of a crucial measurement was merely "pretextual" (Br. in Op. p. 5); but this ploy can no longer stand, for the Board said in footnote 4 to its *Wright Line* decision:

> "As is demonstrated herein, under the *Mt. Healthy* test, there is no real need to distinguish between pretext and dual motive cases. The distinction is nonetheless useful in setting forth the controversy surrounding dual motive cases." (Bd. Supp. Br. 4 a)

Thus, in the 7th Circuit it will take either a decision by this Court or an in banc vote of the 7th Circuit before the *Mt. Healthy* test may be applied.

We respectfully suggest that, however considered, the Board's Supplement creates confusion rather than settling anything. In the short time we have had to consider the Supplemental Brief it seems to us to indicate that it is the belief of the authors that the Board will apply *Mt. Healthy* in a limited fashion. No valid reason has thus far been adduced why *Mt. Healthy* should not be applied to Labor Board cases and we suggest this Court should so say and end the conflict and confusion that now exists.

In the unusual situation that now exists, the Court may wish to consider summary disposition of this case on the papers now before it under Rule 23.1. While the undersigned would be honored to present the case on plenary hearing, the fact is we could not improve upon the reasoning and clarity of the Court's opinion in *Mt. Healthy*. Board counsel, despite the Brief in Opposition, are now bound by the Board's views in *Wright Line* and any effort to take this case out of the *Mt. Healthy* principle, we thought embraced by the Board, would be fruitless. Petitioner does not shrink from a plenary hearing, but the Court may consider that such would be wasteful of the Court's time and Petitioner's money.

If the Court decides to treat the case summarily, Petitioner prays that it order the case remanded to the 7th Circuit with directions to grant Petitioner's Petition (not mentioned in the 7th Circuit's opinion) to Set the Board's Order Aside or, alternatively, to reconsider the case in the light of *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1979

LEAK REPAIRS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging two employees because of their union activities.

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Section 8(a)(3), 29 U.S.C. 158(a)(3) 1

OPINIONS BELOW

The order of the court of appeals (Pet. App. 29a-34a) is unreported. The decision and order of the National Labor Relations Board (Pet. App. 1a-28a) are reported at 241 N.L.R.B. No. 38.

JURISDICTION

The order of the court of appeals issued on May 21, 1980. The petition for a writ of certiorari was filed on July 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth at Pet. 2-3.

STATEMENT

1. Adopting the decision of the Administrative Law Judge, the National Labor Relations Board found that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by discharging two of its employees because of their union activities (Pet. App. 24a).[1] The facts on which the Board's finding is based are as follows.

In April 1977,[2] employees Paver and Jenkins began actively to promote unionization among their fellow employees at petitioner's facility in Alsip, Illinois. They discussed the advantages of union representation with

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[1] The Board also found that petitioner violated Section 8(a)(1) of the Act "by threatening its employees with layoff, plant closure, loss of promotion[,] and other reprisals if they chose union representation" (Pet. App. 24a). This finding was upheld by the court of appeals (Pet. App. 30a), and petitioner does not contest it here (Pet. 3).

[2] All dates referred to in this brief are in 1977 unless otherwise noted.

other employees on "almost * * * a daily basis," attempted to enlist the organizational assistance of two local unions, and arranged a breakfast meeting at which they and other employees compiled a list of "gripes" and discussed the possibility of unionization. (Pet. App. 4a-5a, 7a; Tr. 41-51, 99-103, 148-152, 172; GCX 7.)[3] Upon learning of the interest of these employees in union representation, petitioner's agents repeatedly threatened Jenkins, Paver, and other employees with plant closure and similar reprisals if the shop "went union" (Pet. App. 5a-10a, 20a).

On Monday, June 6, Paver and Jenkins were assigned to a nearby refinery to repair a leaking heat exchanger. The two employees determined that an improvised clamping apparatus would correct the problem and telephoned the specifications for such a clamp to petitioner's engineering department.[4] When the clamp arrived the following Saturday, Paver and Jenkins discovered that the engineering department had not included the packing they had requested, and the clamp failed to seal the leak. Nevertheless, they attempted for 12 hours to remedy the problem. (Pet. App. 13a, 14a-15a; Tr. 78-80, 124-127). When Paver explained the situation to Foreman Leone, he was told not to "worry about it"—

[3]"Tr." refers to the transcript of the hearing before the administrative law judge. "GCX" refers to the exhibits introduced by the General Counsel at that hearing.

[4]Paver and Jenkins decided to order a "packing clamp," which petitioner concedes (Tr. 279) would have sealed the leak in question, with a tongue to "tak[e] up space" (Tr. 74) in the gap. Since the packing material—and not the tongue of the clamp—was intended to effect the seal, they decided to order a tongue somewhat smaller than the gap in order to avoid the sometimes cumbersome task (Tr. 72, 167) of installing a full-sized tongue. For this reason, they recorded the gap as 3.5 inches, rather than the 3.75 inches that they had measured, and relayed that specification to the engineering department. (Pet. App. 11a-12a, 13a-14a; Tr. 70-75, 90-91, 113, 116-122, 125; GCX 8.)

that "[e]verybody makes mistakes"—and that he should order another clamp (Pet. App. 13a, 15a; Tr. 80, 126-127, 178-179). Alsip Branch Manager Spencer also told him not to worry and to order another clamp (Pet. App. 15a; Tr. 128).

The following Monday morning, Superintendent Randolph summoned Paver and Jenkins to Spencer's office. Randolph told the employees that they had made a serious mistake while attempting to fix the leak. Paver protested that he and Jenkins had not made any mistake, since the engineering department had not made the clamp to their specifications. Randolph nonetheless fired both employees. (Pet. App. 13a; Tr. 81-82, 129-130.)

Later that day, employees Gazelle and Durham approached Spencer and asked why Paver and Jenkins had been discharged. Spencer referred to the problem with the clamp. Gazelle replied: "If that's the case, that explains why [Paver] was fired. He was the technician. How come [Jenkins] was fired[?] He's just an assistant [who has no] final say-so in the measuring of a clamp." Spencer stated that he had "talked to Texas [petitioner's headquarters], and when Texas asked who the assistant on the job was, and he had told him Milt Jenkins, [Texas] said get rid of him too." Durham then said that he and Gazelle were "worried about being fired, too * * * [f]or the same thing that Jenkins and Paver were fired for." Spencer replied, "Don't worry about it. Nobody else will be fired for the same thing." (Pet. App. 15a-16a; Tr. 159-160, 181-182.)

In the period preceding their discharge, neither Jenkins nor Paver had received reprimands or criticism concerning their work. Petitioner's Employee Progress Reports—current through the date that Jenkins and Paver were

fired—consistently praised their "judgment" as "outstanding" and described their "job performance" in superlative terms. (Pet. App. 13a, 15a n.6, 23a; Tr. 82, 85, 131; GCX 3, 4, 5, 6, 11.) Although other employees had previously made "mistakes" in measuring, ordering, and installing sealing clamps, Jenkins and Paver were the first to be discharged for such conduct (Pet. App. 18a, 23a; Tr. 13-15, 31-32, 134-135, 183-186).

2. During the unfair labor practice hearing, petitioner contended that Jenkins and Paver had been discharged because of their admitted failure to report the accurate measurements of the leaking flange on the heat exchanger. Petitioner relied on the testimony of supervisor Leone that Paver and Jenkins had submitted erroneous measurements to petitioner's engineering department on Monday, June 6, prior to installing the repair clamp on Saturday, June 11. Paver, according to Leone, had stated that they had deliberately done so because Paver "had a few things to do [Saturday] and * * * didn't feel like working on [the clamp] all day long" (Pet. App. 18a; Tr. 37). Petitioner claimed that this admission of intentional misfeasance was the basis for discharging Jenkins and Paver (Pet. App. 16a-18a; Tr. 9, 18-19, 38).

The Administrative Law Judge disbelieved this account of the events leading to the discharges (Pet. App. 20a). The Administrative Law Judge noted that, as Leone conceded (Tr. 319-321), neither Paver nor Jenkins could possibly have known when they ordered the clamp on Monday, June 5, exactly when the clamp would be delivered. Hence, it was extremely unlikely that they submitted false measurements on Monday because Paver "had a few things to do" and "didn't feel like working * * * all day" the following Saturday. Moreover, petitioner's officers gave directly conflicting accounts of their decision to discharge Paver and Jenkins. Thus,

Branch Manager Spencer testified (Pet. App. 17a; Tr. 8) that he "never mentioned" either employee's name to Vice President Harrison, and that Harrison left the discharge decision "up to [him]." Harrison, on the other hand, testified (Pet. App. 17a-18a; Tr. 19) that Spencer had told him the names of the persons involved and that he ordered Spencer to "get rid of them."

In finding that petitioner's explanation for discharging Paver and Jenkins was pretextual, the Administrative Law Judge also relied (Pet. App. 23a) on the "good work records" of both employees and petitioner's "willingness * * * to tolerate [employee] mistakes in the past." Thus, referring to petitioner's "strong opposition to the employees' union and related protected concerted efforts" and the "timing of their * * * discharges," the Judge concluded that the "real reason" for firing Paver and Jenkins was anti-union animus (*ibid.*).

3. The court of appeals upheld the Board's decision and enforced its order. After referring to Paver's and Jenkins' "exemplary work records," the Court stated that (Pet. App. 33a):

> It is true, as the Board found, that Paver and Jenkins made "a mistake in judgment by not sufficiently and clearly apprising their superiors of their improvisation." But, as the Board noted, [petitioner] had never discharged any other employee for making mistakes; indeed, shortly after the discharge of Paver and Jenkins, the manager of the Alsip facility assured employees Gazelle and Durham that "[n]obody else will be fired for the same thing." These facts, as well as the conflicting accounts of the discharges given by [petitioner's] witnesses which were discredited by the Board, provide strong support for the Board's finding that antiunion considerations—and not the problems

with the clamp—moved [Petitioner] to discharge Paver and Jenkins.

ARGUMENT

Petitioner asks the Court to grant certiorari to resolve a conflict among the circuits as to the standard to be applied in discriminatory discharge cases when there is evidence that an employer had both proper and improper motives for the discharge (Pet. 7-13). However, that question is not presented on this record. The Board's decision here, which was affirmed by the court of appeals, was that petitioner was not motivated by a valid (non-pretextual) reason in discharging the employees. The sole basis for the discharges was anti-union animus.[5] Thus, the only question presented in this case is whether substantial evidence supports the Board's finding that the discharges were not motivated by a legitimate business consideration. That evidentiary issue does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Contrary to petitioner's assertion (Pet. 7-18), the court of appeals' decision in this case does not conflict with *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), or *NLRB* v. *Eastern Smelting and Refining Corp.*, 598 F. 2d 666 (1st Cir. 1979).[6] Those

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[5]While both the Administrative Law Judge (Pet. App. 21a) and the court of appeals (Pet. App. 30a) referred to the mixed motive cases, neither found that petitioner was actually motivated by any asserted valid ground for discharge. The Board's decision—and the court's affirmance—rest squarely on the finding that "the real reason for [the employees'] discharge[] was their union and related protected concerted activities. * * * Management seized upon [the employees'] mistake as an excuse to deter and chill the unionization * * * at the Alsip shop" (Pet. App. 23a, 33a-34a).

[6]Petitioner's assertion (Pet. 8) that the court of appeals "dismissed petitioner's citation of *Mt. Healthy* and *Eastern Smelting* as 'inapposite' " is inaccurate. The court's opinion does not mention *Mt.*

cases stand for the proposition that, once the Board has made a *prima facie* showing that a discharge was discriminatorily motivated, an employer "may still defend by proving that there was a good reason for the discharge and that 'it would have reached the same decision * * * even in the absence of the protected conduct.' " *Eastern Smelting*, *supra*, 598 F. 2d at 671, quoting *Mt. Healthy*, *supra*, 429 U.S. at 287. Petitioner does not deny that the Board established its *prima facie* case here. Indeed, as the court of appeals held (Pet. App. 32a-33a), the "abruptness" of the discharges, their timing—"coming, as [they] did, shortly after [petitioner] became aware of [the] outspoken pro-union sentiments" of Paver and Jenkins, and the "antiunion attitude" manifested by the repeated threats of plant closure and other reprisals are "persuasive" and "highly significant" evidence that anti-union animus was the cause for the discharges. Compare *Eastern Smelting*, *supra*, 598 F. 2d at 674, 675.

Accordingly, the burden of proof shifted to petitioner to establish that it "had a good reason, sufficient in itself, to produce the discharge[s]." *Eastern Smelting*, *supra*, 598 F. 2d at 671, citing *Mt. Healthy*, *supra*, 429 U.S. at 287. However, as the court of appeals explained (Pet. App. 33a), petitioner wholly failed to sustain its burden. The evidence did not show that Paver and Jenkins would have been fired for their "mistake" even in the absence of anti-union animus. To the contrary, both employees had exemplary work records. Petitioner's own official stated that other workers would not be fired for making the same mistake. In addition, no other employees had been fired for making mistakes in measuring, ordering, and installing clamps in the past, and petitioner's witnesses

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Healthy or *Eastern Smelting*. Indeed, petitioner did not cite those cases in its brief in the court of appeals. Rather, it cited them in a letter sent to the court more than a month after oral argument and two weeks before the court handed down its decision.

gave hopelessly conflicting accounts of the discharge decision. In these circumstances, the evidence clearly established that petitioner had seized upon the employees' mistake as an excuse and that its real purpose in firing the employees was to punish and deter protected unionization activities.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1980

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[7]Compare *Eastern Smelting*, *supra*, 598 F. 2d at 670, distinguishing cases in which the alleged "good reason was not a motivation at all" and cases in which both a "[b]ad reason and good reason" animate the decision to discharge an employee. In the present case, there was no occasion for the Board to grapple with the legal significance of a bona fide motivation for a discharge in a "mixed motive" situation, since the evidence showed that the claimed bona fide justification was a sham.

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OCTOBER TERM, 1979

LEAK REPAIRS, INC., PETITIONER

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Act, Section 8(a)(3) and (1), 29 U.S.C. 158(a)(3) and (1) 1-2

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. On August 27, 1980, the Board issued its decision and order in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. No. 150.[1] In that decision, the Board reconsidered its traditional test for determining whether an employee discharge violates Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), and reformulated it to conform to the

[1] The Board's opinion, appended hereto as a supplemental appendix, is referred to as "S.A."

analysis set forth by this Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Thus, the Board announced that it will henceforth apply the following test in discharge cases (S.A. 22a):

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that [the employer's opposition to] protected [employee] conduct was a "motivating factor" in the employer's [discharge] decision. Once this is established, the burden will shift to the employer to demonstrate that the [discharge] would have taken place even in the absence of the protected conduct.

Compare *Mt. Healthy*, *supra*, 429 U.S. at 287 (applying same analysis in First Amendment context); *Arlington Heights*, *supra*, 429 U.S. at 270–271 n.21 (applying same analysis in housing discrimination context).

2. Because this is a "pretext," rather than a "mixed motive," case,[2] and the Board previously viewed each

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[2] As shown at page 6 and note 5 of our brief in opposition, the Board and the court below expressly rejected petitioner's assertion that the discharges of Paver and Jenkins were motivated *at all* by permissible considerations and found that the "real reason" for the discharges was petitioner's opposition to their union and related concerted activities. Therefore, contrary to petitioner's claim, the record in the instant case does not provide the requisite factual basis for finding a "mixed" or "dual" motive, for there is no credited evidence that petitioner had other than a proscribed object in effecting the discharges.

situation differently,[3] it did not have occasion to consider the applicability of the *Mt. Healthy* test in this case. However, in *Wright Line*, the Board announced its intention to apply the *Mt. Healthy* test to both "pretext" and "mixed motive" cases. As shown at pages 6 to 8 of our brief in opposition, the application of the *Mt. Healthy* test to the facts here would not change the Board's ultimate conclusion in this case. It is undisputed that the Board established a prima facie case of antiunion discrimination, and, as the court below expressly found (Pet. App. 33a–34a), petitioner utterly failed in its attempt to show that Paver and Jenkins would have been fired even in the absence of antiunion considerations.

[3] As the Board explained in *Wright Line* (S.A. 4a–5a):

> In modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive.
>
> The pure dual motive case presents a different situation. In such cases, the discipline decision involves two factors. The first is a legitimate business reason. The second reason, however, is not a legitimate business reason but is instead the employer's reaction to its employees' engaging in union or other protected activities. * * * This existence of both a "good" and a "bad" reason for the employer's action requires further inquiry into the role played by each motive* * *.

CONCLUSION

For these reasons as well as those set forth in our brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1980

APPENDIX

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 1—CA—14004

WRIGHT LINE, A DIVISION OF WRIGHT LINE, INC.

and

BERNARD R. LAMOUREUX: AN INDIVIDUAL

DECISION AND ORDER

On October 27, 1978, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and counsel for the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings, and

[1] Respondent contends that the Administrative Law Judge's credibility resolutions, findings of fact, and conclusions of law stem from bias or hostility. We find no merit in this contention. There is no basis for finding that bias or partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Moreover, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91

conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

Respondent excepted, *inter alia*, to the Administrative Law Judge's conclusion that it violated Section 8(a)(3) and (1) of the Act when, on December 30, 1977, it discharged Bernard Lamoureux. We agree with the result reached by the Administrative Law Judge, but only for the reasons that follow.

In resolving cases involving alleged violations of Section 8(a)(3) and, in certain instances, Section 8(a)(1), it must be determined, *inter alia*, whether an employee's employment conditions were adversely affected by his or her engaging in union or other protected activities and, if so, whether the employer's action was motivated by such employee activities. As discussed *infra*, various "tests" have been employed by the Board and the courts to aid in making such determinations. These tests all examine the concept of "causality," that is, the relationship between the employees' protected activities and actions on the part of

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NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Respondent has excepted to the Administrative Law Judge's recommended broad cease-and-desist order. In our recent decision in *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979), we held that such broad injunctive language is warranted only when a respondent has been shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Inasmuch as the instant violations do not meet this test, we shall modify the Administrative Law Judge's Order to require Respondent to refrain from violating the Act in any like or related manner.

their employer which detrimentally affect their employment.

The Administrative Law Judge's Decision in the instant case reveals some uncertainty regarding the appropriate mode of analysis for examining causality in cases alleging unlawful discrimination. Indeed, similar doubts as to the applicable test appear to have become widespread at various levels of the decisional process primarily as a result of conflict in this area among the courts of appeals and between certain courts of appeals and the Board.

After careful consideration we find it both helpful and appropriate to set forth formally a test of causation for cases alleging violations of Section 8(a)(3) of the Act. We shall examine causality in such cases through an analysis akin to that used by the Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977).

It is our belief that application of the *Mt. Healthy* test[3] will maintain a substantive consistency with existing Board precedent and accommodate the concerns expressed by critics of the Board's past treatment of cases alleging unlawful discrimination. We further find the *Mt. Healthy* test to be in harmony with the Act's legislative history as well as pertinent Supreme Court decisions. Finally, in this regard, enunciation of the *Mt. Healthy* test will alleviate the confu-

[3] For ease of reference, we shall refer to this test of causality as the *Mt. Healthy* test. We note, however, that *Mt. Healthy* itself does not constitute a construction of the National Labor Relations Act and, accordingly, our Decision here is not compelled by *Mt. Healthy*. We do not view *Mt. Healthy* as at odds with our previous construction of the Act.

sion which now exists at various levels of the decisional process and do so in a manner that, we conclude, accords proper weight to the legitimate conflicting interest in this area, thereby advancing the fundamental objectives of the Act.

I. THE DISTINCTION BETWEEN PRETEXT AND DUAL MOTIVE

It is helpful, initially, to distinguish between what are termed "pretext" cases and "dual motive" cases because it is in the dual motive situation where the legitimate interests of the parties most plainly conflict. Consequently it is in such situation that the existing controversy and confusion in this area are highlighted.[4]

In modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive.

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[4] As is demonstrated herein, under the *Mt. Healthy* test, there is no real need to distinguish between pretext and dual motive cases. The distinction is nonetheless useful in setting forth the controversy surrounding dual motive cases.

The pure dual motive case presents a different situation. In such cases, the discipline decision involves two factors. The first is a legitimate business reason. The second reason, however, is not a legitimate business reason but is instead the employer's reaction to its employees' engaging in union or other protected activities. This latter motive, of course, runs afoul of Section 8(a)(3) of the Act. This existence of both a "good" and a "bad" reason for the employer's action requires further inquiry into the role played by each motive and has spawned substantial controversy in 8(a)(3) litigation.[5]

II. THE "IN PART" TEST

For a number of years now, when determining whether the Act has been violated in a dual motivation case, the Board has applied what is termed the "in part" causation test. In its present form the "in part" test provides that if a discharge is motivated, "in

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[5] Unfortunately, the distinction between a pretext case and a dual motive case is sometimes difficult to discern. This is especially true since the appropriate designation seldom can be made until after the presentation of all relevant evidence. The conceptual problems to which this sometimes blurred distinction gives rise can be eliminated if one views the employer's asserted justification as an affirmative defense. Thus, in a pretext situation, the employer's affirmative defense of business justification is wholly without merit. If, however, the affirmative defense has at least some merit a "dual motive" may exist and the issue becomes one of the sufficiency of proof necessary for the employer's affirmative defense to be sustained. Treating the employer's plea of a legitimate business reason for discipline as an affirmative defense is consistent with the Board's method of deciding such cases. See *Bedford Cut Stone Co., Inc.*, 235 NLRB 629 (1978).

part," by the protected activities of the employee the discharge violates the Act even if a legitimate business reason was also relied on. *The Youngstown Osteopathic Hospital Association*, 224 NLRB 574, 575 (1976). This "in part" analysis has taken various forms with the "in part" language being modified while the underlying concept remains intact. Thus, the Board has used the following terms in dual motivation cases: "the motivating or moving cause," *The Bankers Warehouse Company*, 146 NLRB 1197, 1200 (1964); "the motivating factor," *Tursair Fueling, Inc.*, 151 NLRB 270, 271, fn. 2 (1965); "the substantial, contributing factor," *Erie Sand Steamship Company*, 189 NLRB 63, fn. 1 (1971); "motivated principally," *P.P.G. Industries, Inc.*, 229 NLRB 713 (1977); "a substantial cause," *Broyhill Company*, 210 NLRB 288, 296 (1974); "a substantial or motivating ground," *KBM Electronics, Inc., t/a Carsounds*, 218 NLRB 1352, 1358 (1975); "in substantial part," *Central Casket Co.*, 225 NLRB 362 (1976).

Since its inception, the "in part" test has been perceived by some to be, at least conceptually, at odds with the oft-repeated idea that:

> Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids. [*N.L.R.B.* v. *MaGahey*, 233 F.2d 406, 413 (5th Cir. 1956). See also *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966). Compare *Shattuck Denn Mining Corporation* v. *N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966).]

A conflict between this concept and the "in part" rationale is seen because in a dual motivation case, the employer does have a legitimate reason for its action. Yet, an improper reason for discharge is also present. Thus, the employer's recognized right to enforce rules of its own choosing is viewed as being in practical conflict with the employees' right to be free from adverse effects brought about by their participation in protected activities. Critics of the "in part" test have asserted that rather than seeking to resolve this conflict and accommodate the legitimate competing interests, the analysis goes only half way, in that once hostility to protected rights is found, the inquiry ends and the employer's plea of legitimate justification is ignored.

III. THE ADVENT OF THE "DOMINANT MOTIVE" TEST AND THE LAW OF THE CIRCUITS

In recent years, various courts of appeals have become increasingly critical of the "in part" analysis. The earliest, most outspoken critic of the "in part" test has been the First Circuit, which in *N.L.R.B.* v. *Billen Shoe Co., Inc.*, 297 F.2d 801 (1st Cir. 1968), examined the Board's application of the "in part" analysis and found it lacking.[6] Fundamental to its rejection of the "in part" test is the court's view that the test ignores

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[6] Actually, as early as 1953, in *N.L.R.B.* v. *Whitin Machine Works*, 204 F.2d 883, 885 (1st Cir. 1953), that circuit court expressed disagreement with Board analysis in 8(a)(3) cases. Yet, it was not until 1963 that Judge Aldrich of the First Circuit formally initiated the "dominant motive" or "but for" test. See *N.L.R.B.* v. *Lowell Sun Publishing Co.*, 320 F.2d 835, 842 (1st Cir. 1963).

the legitimate business motive of the employer and places the union activist in an almost impregnable position once union animus has been established.

In an effort to remedy what it viewed as the inequities of the test, the First Circuit began to advance its own process of analysis in dual motivation cases. Thus, in *Billen Shoe, supra*, the First Circuit stated that:

> When good cause for criticism or discharge appears, the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one. The mere existence of anti-union animus is not enough. [397 F.2d at 803.]

In other opinions, the First Circuit has termed its test a "dominant motive" (see fn. 6, *supra*) or a "but for" test. *Coletti's Furniture, Inc.* v. *N.L.R.B.*, 505 F.2d 1293 (1st Cir. 1977). For our purposes, this test will be referred to as the "dominant motive" test, which, in its most simple form provides that when both a "good" and "bad" reason for discharge exist, the burden is upon the General Counsel to establish that, in the absence of protected activities, the discharge would not have taken place. *Coletti's Furniture, supra* at 1293, 1294; *N.L.R.B.* v. *Fibers International Corporation*, 439 F.2d 1311, 1312, fn. 1 (1st Cir. 1971).

Conflict between the Board and the First Circuit in this area has escalated to the point where in *Coletti's Furniture, supra* at 1293, the court stated that "[T]here can be little reason for us to rescue the Board hereafter if it does not both articulate and apply our rule." In addition, the conflict over which test to apply

in dual motive cases has now spread throughout the circuit courts to the extent that a review of the tests currently applied by the Board, our Administrative Law Judges, and the various courts of appeals reveals a picture of confusion and inconsistency.[7]

Thus, the District of Columbia Circuit, in *Allen* v. *N.L.R.B.*, 561 F.2d 976, 982 (D.C. Cir. 1977), applied an "in part" test, stating that:

> [T]he cases are legion that the existence of a justifiable ground for discharge will not prevent such discharge from being an unfair labor practice if partially motivated by the employee's protected activity . . . .[8]

Several months later, another panel applied the "dominant motive" test as propounded by the First Circuit in *Billen Shoe, supra,* holding that:

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[7] Although it is responsible for the advent of the "dominant motive" test, which now is found in various forms in the Circuits, the First Circuit, in its recent decision in *N.L.R.B.* v. *Eastern Smelting and Refining Corporation*, 598 F.2d 666 (1st Cir. 1979), appears to have moved away from the "dominant motive" test as earlier expressed. In *Eastern Smelting*, the First Circuit articulated and applied for the first time the *Mt. Healthy* test set forth in this opinion. In *Eastern Smelting*, however, the First Circuit did not explicitly abandon its "dominant motive" test, nor did it abate its criticism of the "in part" test.

[8] An "in part" test has also been applied by the Sixth, Seventh, and Tenth Circuits. See *N.L.R.B.* v. *Retail Store Employees Union, Local 876, Retail Clerks International Association, AFL—CIO*, 570 F.2d 586, 590 (6th Cir. 1978), cert. denied 439 U.S. 819; *N.L.R.B.* v. *Gogin, d/b/a Gogin Trucking*, 575 F.2d 596, 601 (7th Cir. 1978); *M. S. P. Industries, Inc., d/b/a The Larimer Press* v. *N.L.R.B.*, 568 F.2d 166, 173—174 (10th Cir. 1977).

> The burden on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose an illegal one. [*Midwest Regional Joint Board, Amalgamated Clothing Workers of America, AFL—CIO* v. *N.L.R.B.*, 564 F.2d 434, 440 (D.C. Cir. 1977).][9]

Similarly, the Ninth Circuit has applied both a "dominant motive" and an "in part" test.[10] Then, in *Polynesian Cultural Center* v. *N.L.R.B.*, 582 F.2d 467, 473 (9th Cir. 1978), that court noted that:

> Several of our cases have said that the discriminatory motive must be the moving cause for the discharge. . . . On the other hand, this court has indicated that it too, on occasion, employs the but-for approach.

Tests which have been applied by other circuit courts fit neatly into neither the "in part" nor "dominant motive" category. For example, in *Waterbury Community Antenna, Inc.* v. *N.L.R.B.*, 587 F.2d 90, 98 (2d Cir. 1978), the Second Circuit stated its test as follows:

> The rule of causation applied in this Circuit is that "the General Counsel must at least provide a reasonable basis for inferring that the permissible ground alone would not have led to the discharge, so that it was partially motivated by an impermissible one." . . . The magnitude of the impermissi-

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[9]This "dominant motive" test has also been applied by the Fourth Circuit. See *Firestone Tire and Rubber Company* v. *N.L.R.B.*, 539 F.2d 1335, 1337 (4th Cir. 1976).

[10]Compare *Western Exterminator Company* v. *N.L.R.B.*, 565 F.2d 1114, 1118 (9th Cir. 1977), with *Penasquitos Village, Inc.* v. *N.L.R.B.*, 565 F.2d 1074, 1082—83 (9th Cir. 1977).

> ble ground is immaterial . . . as long as it was the "but for" cause of the discharge . . . .

The Third Circuit stated in *Edgewood Nursing Center, Inc.* v. *N.L.R.B.*, 581 F.2d 363, 368 (3d Cir. 1978), that:

> [T]he employer violates the Act if anti-union animus was the "real motive" . . . . If two or more motives are behind a discharge, the action is an unfair labor practice if it is partly motivated by reaction to the employee's protected activity . . . . On the other hand, if the employee would have been fired for cause irrespective of the employer's attitude toward the union, the real reason for the discharge is nondiscriminatory . . . . Thus, if the employer puts forward a justifiable cause for discharge of the employee, the Board must find that the reason was a pretext, and that anti-union sentiment played a part in the decision to terminate the employee's job.

The Fifth Circuit, in *N.L.R.B.* v. *Aero Corporation*, 581 F.2d 511, 514–515 (5th Cir. 1978), ruled that:

> [T]he Board is not required to establish substantial evidence that the conduct is motivated solely by anti-union animus. It is sufficient if substantial evidence shows that the force of anti-union purpose was "reasonably equal" to the lawful motive prompting conduct.

Finally, the Eight Circuit has held that:

> [T]he mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity. [*Singer Company* v. *N.L.R.B.*, 429 F.2d 172, 179 (8th Cir. 1970).]

We note that our citation of the foregoing cases is intended neither to explain nor vindicate the position expressed by any particular circuit court. Rather, it is intended to demonstrate that in an area fundamental to the Act, namely, Section 8 (a) (3), disagreement and controversy are rampant among the various decision-making bodies.

IV. THE *MT. HEALTHY* TEST

As the preceding two sections have demonstrated, the issue of what causation test is to be used to determine whether the Act has been violated in dual motivation cases is now in a position where some view the "in part" test as standing at one extreme, while the other extreme is represented by the "dominant motive" test first advanced by the First Circuit. Despite this perceived polarization, room for accommodation and clarification does exist in the test of causality set forth in the recent Supreme Court decision of *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274.

The *Mt. Healthy* case arose when Doyle, an untenured teacher, brought suit against the Mt. Healthy School Board, alleging that it had wrongfully refused to renew his contract. The school board presented Doyle with written reasons for their refusal. The two reasons cited were: (1) Doyle's use of obscene language and gestures in the school cafeteria, and (2) Doyle's conveyance of a change in the school's policies to a local radio station. In his suit, Doyle alleged that the refusal to renew his contract violated his rights under

the first and fourteenth amendments. He sought reinstatement and backpay.

The district court found that of the two reasons cited by the school board, one involved unprotected conduct while the second was clearly protected by the first and fourteenth amendments. The district court reasoned that since protected activity had played a substantial part in the school board's decision, its refusal to renew the contract was improper and Doyle was, therefore, entitled to reinstatement and backpay. The court of appeals affirmed, *per curiam*.

The Supreme Court reversed. In a unanimous opinion, the Court rejected the lower court's application of such a limited "in part" test and ruled that the school board must be given an opportunity to establish that its decision not to renew would have been the same if the protected activity had not occurred. The Court reasoned as follows:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enun[ci]ated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a

> position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decisions. [429 U.S. at 285—286.]

From this rationale, the Court fashioned the following test to be applied on remand:

> Initially, in this case, the burden was properly placed upon respondent [employee] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. [429 U.S. at 287.]

Thus, the Court established a two-part test to be applied in a dual motivation context. Initially, the employee must establish that the protected conduct was a "substantial" or "motivating" factor. Once this is accomplished, the burden shifts to the employer to demonstrate that it would have reached the same decision absent the protected conduct.

This test in *Mt. Healthy* is further explicated by the Court in *Village of Arlington Heights* v. *Metropolitan*

Housing Development Corp., 429 U.S. 252 (1977), a case decided the same day as *Mt. Healthy*. A brief discussion of *Arlington Heights* is helpful in examining the parameters of the *Mt. Healthy* test.

Arlington Heights involved an effort by a real estate developer to obtain a zoning change enabling it to construct a housing development. During the zoning hearing, it became apparent that the new development would be racially integrated. The Village ultimately denied the rezoning and, in response, a group brought suit seeking injunctive and declaratory relief alleging that the decision was racially motivated. The Supreme Court ruled that plaintiffs had "failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." (429 U.S. at 270.)

In reaching its decision, the Court invoked the *Mt. Healthy* test. Thus, the Court, citing *Mt. Healthy*, stated that:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. [429 U.S. at 270—271, fn. 21.]

The *Arlington Heights* decision is instructive in one other respect as well. For in its decision, the Court recognized that efforts to determine what is the "dominant" or "primary" motive in a mixed motivation situation are usually unavailing. In this regard, the Court stated that a plaintiff is not required

> to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. [429 U.S. at 265.]

Assuming for the moment that the *Mt. Healthy* test is applicable to dual motive discharges under Section 8(a)(3), it is evident that *Mt. Healthy* represents a rejection of an "in part" test which stops with the establishment of a *prima facie* case or at consideration of an improper motive. Indeed, rejection of such an "in part" test is implicit in the Supreme Court's reversal of the district court's application of such an analysis.

The "dominant motive" test fares no better under *Mt. Healthy*. While a surface similarity between *Mt. Healthy* and the "dominant motive" test exists in that both reject a limited "in part" analysis and both require proof of how the employer would have acted in the absence of the protected activity, the similarity ends there. For the *Mt. Healthy* test and the "dominant motive" test place the burden for this proof on different parties.

As has been noted, under the "dominant motive" test it is the General Counsel who, in addition to establishing a *prima facie* showing of unlawful motive, is further required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place in the absence of the employees' protected activities. However, it is made abundantly clear in *Mt. Healthy* (and was specifically reiterated in *Arlington Heights*) that after an employee or, here, the

General Counsel makes out a *prima facie* case of employer reliance upon protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity. This distinction is a crucial one since the decision as to who bears this burden can be determinative.

The "dominant motive" test is further undermined by the *Arlington Heights* decision. As noted above, the Court in *Arlington Heights* eschewed the "dominant motive" analysis by specifically stating that it is practically impossible to examine a dual motivation decision and arrive at a conclusion as to what was the "dominant" or "primary" purpose or motive. *Arlington Heights*, 429 U.S. at 265. Finally, the shifting burden analysis set forth in *Mt. Healthy* and *Arlington Heights* represents a recognition of the practical reality that the employer is the party with the best access to proof of its motivation.

V. APPLICATION OF THE *MT. HEALTHY* TEST TO SECTION 8(a)(3)

In the final analysis, the applicability of the *Mt. Healthy* test to the NLRA depends upon its compatibility with established labor law principles and the extent to which the test reaches an accommodation between conflicting legitimate interests. For, as the Supreme Court noted, in unfair labor practice cases:

> The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effecutate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to

> limited judicial review. [*N.L.R.B.* v. *Truck Driver's Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL*, 353 U.S. 87, 96 (1957).]

Initially, support for the *Mt. Healthy* test of shifting burdens is found in the 1947 amendment of Section 10(c). That amendment provided that:

> No order of the Board shall require the reinstatement of any individual as employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

While the amendment itself does not address the "in part" or "dominant motive" analysis or the allocation of burdens, the legislative history does. In explaining the amendment Senator Taft stated:

> The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board. [93 Cong. Rec. 6678; 2 Leg. Hist. 1595 (1947).]

The principle that "the employer has to make the proof" is also found in the Supreme Court's decision in *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). In that case the Court was concerned with the

burden of proof in 8(a)(3) cases. It first noted that certain employer actions are inherently destructive of employee rights and, therefore, no proof of antiunion motive is required. Of course, the discharge of an employee, in and of itself, is not normally an inherently destructive act which would obviate the requirement of showing an improper motive. In this context, the Court in *Great Dane* stated that:

> [I]f the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus . . . once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. [388 U.S. at 34 (emphasis in the original)]

Thus, both Congress and the Supreme Court have implicitly sanctioned the shift of burden called for in *Mt. Healthy* in the context of Section 8(a)(3).[11]

Indeed, as is indicated by the above quotation of legislative history and the citation of *Great Dane*, the shifting burden process in *Mt. Healthy* is consistent

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[11] It should be noted that this shifting of burdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifting burden merely requires the employer to make out what is actually an affirmative defense (see fn. 6, *supra*) to overcome the *prima facie* case of wrongful motive. Such a requirement does not shift the ultimate burden.

with the process envisioned by Congress and the Supreme Court to resolve discrimination cases, although the process has not been articulated formally in the manner set forth in *Mt. Healthy*. Similarly, it is the process used by the Board. Thus, the Board's decisional process traditionally has involved, first, an inquiry as to whether protected activities played a role in the employer's decision. If so, the inquiry then focuses on whether any "legitimate business reason" asserted by the employer is sufficiently proven to be the cause of the discipline to negate the General Counsel's showing of prohibited motivation.[12] Thus, while the Board's process has not been couched in the language of *Mt. Healthy*, the two methods of analysis are essentially the same.

Perhaps most important for our purposes, however, is the fact that the *Mt. Healthy* procedure accommodates the legitimate competing interests inherent in dual motivation cases, while at the same time serving to effectuate the policies and objectives of Section 8(a)(3) of the Act. As the Supreme Court noted in *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), it is fundamental in "situations present[ing] a complex of motives" that the decisional body be able to accomplish the "delicate task" of

> weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy

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[12] The absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case. See e.g., *Shattuck Denn Mining Company* v. *N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966).

> the intended consequences upon employee rights against the business ends to be served by the employer's conduct. [373 U.S. at 229.]

Mt. Healthy achieves this goal.

Under the *Mt. Healthy* test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. Also, the employer is provided with a formal framework within which to establish its asserted legitimate justification. In this context, it is the employer which has "to make the proof." Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because its action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

Finally, we find it to be of substantial importance that our explication of this test of causation will serve to alleviate the intolerable confusion in the 8(a)(3) area. In this regard, we believe that this test will provide litigants and the decisionmaking bodies with a uniform test to be applied in these 8(a)(3) cases.[13]

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[13] Still an additional benefit which will result from our use of the *Mt. Healthy* test is that the perceived significance in distinguishing between pretext and dual motive cases will be obviated.

Thus, for the reasons set forth above, we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[14]

Finally, inherent in the adoption of the foregoing analysis is our recognition of the advantage of clearing the air by abandoning the "in part" language in expressing our conclusion as to whether the Act was violated. Yet, our abandonment of this familiar phraseology should not be viewed as a repudiation of the well-established principles and concepts which we have applied in the past. For, as noted as the outset of this Decision, our task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimen-

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[14] In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it was enough to determine events, it is enough to come within the proscription of the Act.

tally affect such employees' employment. Indeed, it bears repeating that the "in part" test, the "dominant motive" test, and the *Mt. Healthy* test all share a fundamental common denominator in that the objective of each is to determine the relationship, if any, between employer action and protected employee conduct. Until now, in making this determination we frequently have employed the term "in part." But in so doing it only was a term used in pursuit of our goal which is to analyze thoroughly and completely the justification presented by the employer. It is, however, our considered view that adoption of the *Mt. Healthy* test, with its more precise and formalized framework for making this analysis, will serve to provide the necessary clarification of our decisional processes while continuing to advance the fundamental purposes and objectives of the Act.

VI. APPLICATION OF THE *MT. HEALTHY* TEST TO THE FACTS OF THE INSTANT CASE

In the instant case, the General Counsel alleges that Respondent discharged Bernard Lamoureux in violation of Section 8(a)(3) and (1) of the Act. Respondent denies this allegation, asserting that Lamoureux was discharged for violating a plant rule against "knowingly altering, or falsifying production time reports, payroll records, time cards." The Administrative Law Judge found that Respondent's discharge of Lamoureux violated Section 8(a)(3) and (1) of the Act. For the reasons set forth below, we agree.

The record reveals that at the time of his discharge, Lamoureux had been employed by Respondent for over 10 years. He had occupied the position of inspector for 2 years and was considered a better than average employee. Indeed, at the hearing, his work was described as admirable. On the day prior to his discharge, Lamoureux's supervisor, Forte, was instructed by the plant superintendent to "check" on Lamoureux, who had been observed entering a restroom carrying a newspaper.[15] The next morning, Forte discovered certain discrepancies in Lamoureux's timesheet. The timesheet indicated that Lamoureux had been working on certain jobs at the time when Forte had been looking for him the previous day but had been unable to find him at his work station.[16] Upon reporting this finding to his own supervisor, Forte was told that "the offense was a dischargeable offense."

Thereafter, Forte was instructed to ask Lamoureux for an explanation. Although Forte did so, the record reveals that Lamoureux's final check had already been prepared when Forte confronted him with the discrepancy. Respondent then rejected Lamoureux's explanation, in which he conceded that he may not have performed the jobs at the times indicated on his timesheet but maintained that the jobs had in fact

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[15] Respondent never contended that such conduct violated shop rules.

[16] It was conceded that Lamoureux's work activities might legitimately have carried him to other parts of the plant. Nevertheless, Forte did not use the paging system to try to locate Lamoureux, or even check the men's room where Lamoureux was last seen.

been performed that day. Lamoureux was promptly dicharged, purportedly for violating a plant rule against "knowingly altering, or falsifying production time reports, payroll records, time cards." Respondent conceded that Lamoureux was not discharged for being away from his work station or for not performing his assigned work.[17]

In presenting his *prima facie* case of wrongful motive, the General Counsel demonstrated that Lamoureux had become a leading union advocate, beginning in 1976. During both the 1976 and 1977 election campaigns, both of which were lost by the Union, Lamoureux actively solicited support for the Union among his fellow employees. It is undisputed that Respondent was well aware of his sympathies and activities. Thus, during the 1977 campaign, which like the 1976 campaign appears to have included aggressive electioneering on both sides, Lamoureux was reprimanded by management, allegedly for pressuring an employee regarding the Union.[18] Also, during the 1977 campaign Respondent's supervisors on several occasions directed gratuitous remarks regarding the Union toward Lamoureux, once calling him the "union kingpin." We also note that the discharge took place just 2 months after the 1977 election.

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[17] In this connection, we note that Respondent did not seek to determine where Lamoureux had been when Forte discovered him absent from his work station, nor did Respondent seek to verify whether Lamoureux had, as he claimed, performed the inspections indicated on his timesheet. Rather, Respondent simply informed Lamoureux that he was no longer worthy of Respondent's trust.

[18] Respondent's witness later conceded that the word "pressure" was too strong.

In addition, it can scarcely be disputed that Respondent harbored animus toward both the Union and union activists, including Lamoureux. Respondent's antiunion campaign included, *inter alia*, references to the murder indictment of an official of one of the Union's sister locals in another State, as well as an unsupported claim that Respondent's "chances for survival and growth would be seriously hurt by the presence of a union." In view of the tone of the campaign, along with Respondent's remarks directed specifically to Lamoureux, we agree with the Administrative Law Judge that Respondent displayed considerble animus toward Lamoureux, whom it considered to be the "union kingpin."

The General Counsel also demonstrated that Respondent never previously had discharged an employee under these circumstances, although, as detailed by the Administrative Law Judge, the record shows that employees commonly completed timesheets as Lamoureux had and that such discrepancies had no effect on the accuracy of the system of production control. It also appears that, of the only two other employees ever discharged for violating the rule regarding the falsification of company records, one was discharged for embezzlement and the other for deliberate forgery of sales records in order to collect fraudulent sales commissions.[19] Furthermore, two employees who had deliberately violated the same rule by falsifying their timecards were issued warnings and were not discharged.

[19] Unlike these employees, it was conceded that Lamoureux could not have benefited financially from the discrepancies on his time sheet.

From the foregoing, we conclude that the General Counsel made a *prima facie* showing that Lamoureux's union activity was a motivating factor in Respondent's decision to discharge him. Our conclusion is based on Respondent's union animus, as reflected in the hostility directed toward Lamoureux resulting from his active role in the union campaign as well as the timing of the discharge, which occurred shortly after completion of the latest union election. Also of significance is Respondent's sudden and unexplained departure from its usual practice of declining to discharge employees for their first violation of this nature. Such action here is especially suspect in light of Lamoureux's admirable work record and the fact that his timesheet discrepancies neither inured to his benefit nor served to affect deterimentally Respondent's production control system.

We further find that Respondent has failed to demonstrate that it would have taken the same action against Lamoureux in the absence of his engaging in union activities. In this regard we note that the record discrepancies were only discovered by Forte following the plant supervisor's directive to "check" on Lamoureux, despite the fact that Respondent had no reason to believe that Lamoureux was untrustworthy. Under the circumstances, such actions suggest a predetermined plan to discover a reason to discharge Lamoureux and thus rid the facility of a union activist.[20] Further undermining Respondent's defense is the evidence which demonstrates disparate treatment.

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[20] See, e.g., *Lipman Bros., Inc., et al.*, 147 NLRB 1342, 1376 (1964), enfd. 355 F.2d 15, 21 (1st Cir. 1966).

As noted previously, the only instances where discharge was imposed by Respondent as a result of "record discrepancies" were where the employee in question sought to embezzle funds or collect fraudulent sales commissions. Lamoureux's infraction clearly did not rise to such a level. Indeed, the record demonstrates that such record discrepancies were commonplace and generally resulted in no discipline whatsoever. In those instances where discipline was imposed, Respondent issued warnings or other forms of discipline short of discharge.

Accordingly, for the reasons noted above, we find that Respondent's discharge of Bernard Lamoureux violated Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Wright Line, a Division of Wright Line, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. August 27, 1980

JOHN H. FANNING,
Chairman

JOHN A. PENELLO,
Member

JOHN C. TRUESDALE,
Member

NATIONAL LABOR RELATIONS BOARD

Member JENKINS, concurring:

I am willing to apply the shifting burden-of-proof standard my colleagues adopt for determining whether a discharge was caused by an unlawful purpose where the discharge may have had more than one cause, not all of them unlawful. This standard may suffice for most cases. However, there may remain a residue, perhaps small, of cases of mixed motive or cause, where the purposes are so interlocked that it is not possible to point to one of them as "the" cause. All of them, both lawful and unlawful, may have combined to push the employer to the decision he would not have reached if even one were absent. In such cases, it is plainly not the latest event, the most recent purpose, which is the cause of the discharge; rather, it is all of

them together, from earliest to latest, which cause the discharge.[21]

Where the evidence does not permit the isolation of a single event or motive as the cause of the discharge, then plainly the unlawful motive must be deemed to be part of the cause of the discharge, and the discharge is unlawful. By definition, it took all these straws to break the camel's back, so each of them provides a contribution "but for" which the camel would have survived. It is fair that the party who created this situation, in which isolation of a single cause is impossible, bear the burden created by his venture into an area prohibited by the Act. Thus, the "in part" standard, as distinguished from the "but for" and "dominant motive" tests, is the only criterion which will effectuate the purposes of the statute. As my colleagues note, the legislative history shows plainly that Congress itself struck this balance, and I read *Mt. Healthy* as also in effect adopting this standard.

Thus, my only reservation now is the way in which the shifting burden-of-proof standard may be applied to prevent unlawful conduct. If experience shows it to be inadequate in application, modification may be required.

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[21] It is the difficulty in singling out one individual cause in such situations which has led to criticism and rejection of a "but for" standard as a measure of cause; there is no logical way to apply a "but for" standard in such cases except to fasten upon the most recent event or motive. See Prosser, "Handbook of the Law of Torts" at 238—239, 4th ed. (1971); LaFave and Scott, "Handbook on Criminal Law," at 249—251 (1972).

Dated, Washington, D.C. August 27, 1980

HOWARD JENKINS, JR.,
Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage membership in Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by unlawfully discharging any employees or discriminating against them in any other manner with respect to their hire or tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL offer Bernard R. Lamoureux reinstatement to his former job or, if his job no longer exists, to a substantially equivalent job, discharging, if necessary, any employee hired to replace him.

WE WILL restore his seniority and other rights and privileges and WE WILL pay him the

backpay he lost because we discharged him, with interest.

WRIGHT LINE, A DIVISION
OF WRIGHT LINE, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3313.

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES WASHINGTON, D.C.

Case 1—CA—14004

WRIGHT LINE, A DIVISION OF WRIGHT LINE, INC.

and

BERNARD R. LAMOUREUX, AN INDIVIDUAL

Robert P. Redbord, Esq.,
and *Richard D. Zaiger, Esq.*,
for the General Counsel.

Julius Kirle, Esq., of Chestnut Hill, Massachusetts, for the Respondent.

Bernard R. Lamoureux of Dudley, Massachusetts, *in propria persona.*

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge: The charge filed by Bernard R. Lamoureux on January 3, 1978, was served on Wright Line, a Division of Wright Line, Inc., the Respondent herein, on January 4, 1978. A complaint and notice of hearing was issued on February 23, 1978. In the complaint it was charged that the Respondent unlawfully discharged said Bernard R. Lamoureux on December 30, 1977, in violation of Section 8(a)(1) and (3) of the Na-

tional Labor Relations Act, as amended, herein referred to as the Act.

The Respondent filed a timely answer denying that it had engaged in or was engaging in the unfair labor practices alleged.

The case came on for hearing at Boston, Massachusetts, on June 19 and July 10, 11, 12, and 13, 1978. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

FINDINGS OF FACT,[1] CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF THE RESPONDENT

Respondent is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the Commonwealth of Massachusetts.

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[1]The facts found herein are based on the record as a whole and observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *N.L.R.B.* v. *Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in the light of the entire record. No testimony has been pretermitted.

At all times herein mentioned, Respondent has maintained its principal office and place of business at 160 Gold Star Boulevard, in the city of Worcester and Commonwealth of Massachusetts (herein called the Worcester location), and is now and continuously has been engaged at said plant in the manufacture, warehousing, and distribution of accessory products for computer rooms to be purchased and transported in interstate commerce from and through various States of the United States other than the Commonwealth of Massachusetts, and causes, and continuously has caused at all times herein mentioned, substantial quantities of materials to be sold and transported from said plant in interstate commerce to States of the United States other than the Commonwealth of Massachusetts.

Respondent annually ships materials valued in excess of $50,000 from its Worcester, Massachusetts, location to points outside the Commonwealth of Massachusetts. Respondent annually receives materials valued in excess of $50,000 at its Worcester, Massachusetts, location directly from points outside the Commonwealth of Massachusetts.

The aforesaid Respondent is and has been engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein referred to as the Union or Teamsters Local 170), is a

labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Facts

On August 27, 1976, and October 20, 1977, representation elections were conducted in Cases 1—RC—14576 and 1—RC—15338, respectively, at the Respondent's facility in a unit of "all production and maintenance employees, including warehousemen, truck drivers, tool and die room employees, new product department employees, and cafeteria employees employed by the Employer at its 160 Gold Star Boulevard and 150 Grove Street, Worcester, Massachusetts locations, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act." Teamsters Local 170, the only Union on the ballots, lost both elections. During both election campaigns, the Respondent opposed the Union and urged employees to vote against it. In the most recent campaign in 1977, the Respondent issued antiunion letters and leaflets to the employees. In pressing its intense antiunion campaign, the Respondent published reproductions of certain newspaper articles, derogatory of the Teamsters, one of which displayed a picture of Anthony Provenzano in handcuffs with the caption "Teamster Provenzano Indicted in 1961 Murder."

Moreover, the Respondent couched its appeal in terms of survival, for it wrote its employees, "It is our firm belief, which by the way many of our loyal employees share with us, that Wright Line's chances for

survival and growth would be seriously hurt by the presence of a union here . . . . and with your *NO* vote, Wright Line in Worcester can continue on its competitive drive for survival in a very difficult industry." It is positive that the Respondent does not want the Union in its plant.

Lamoureux was the employee who first brought the Union to the Respondent's plant in 1976. He "got things going as far as getting pledge cards, getting lieutenants to pass them out. And so forth." He attended union meetings and solicited union affection at the Respondent's plant. Lamoureux served as an alternate observer at the 1976 election. Lamoureux was as active in the second election as in the first except that he did not serve as an alternative observer. During the 1977 election campaign, Francis O. Forte, supervisor of quality control and time study and Lamoureux's boss, called Lamoureux to Manager of Product Engineering Donald McCallum's office and charged him with having been seen "pressuring someone to vote union in the paint department." Lamoureux denied the accusation and stated if Forte persisted he would like a grievance form. Later Forte apologized and said that his use of the word " 'pressure' was too strong." On another occasion while Lamoureux was counting his paycheck money, Forte remarked, "What's that. Union campaign funds?" Shortly before the 1977 election Rudolph Tuoni, the maintenance foreman, said to Lamoureux, "Everybody knows you're the Union kingpin."[2]

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[2] This testimony was not denied.

Lamoureux was employed as an inspector and was assigned to departments 12 and 14 where he inspected pieces fabricated by the machines in these departments. The function of department 12, the forming department, was to "form bends and angles of the sheet metal parts." Department 14 "performs the operation of welding one or more sheet metal parts together to form components."[3] Lamoureux's job was (as explained by Lamoureux) "just to see that all manufactured items were within blueprint specifications, and through job experience there were a lot of other small areas, such as fit and things like that, which were not on the blueprint."

When a machine was set up in either department 12 or 14[4] Lamoureux performed what was termed a first-piece inspection by which he determined whether the piece produced came up to the blueprint specifications. If it did not, production was not permitted until the piece passed inspection. When the inspector was not available, the setup man or the foreman was authorized to pass a first piece. After a favorable first-piece inspection was completed a written approval was endorsed on the "traveling inspection document [traveling inspection report] which goes with the blueprint for each job." In addition to first-piece inspections, Lamoureux also performed intermediate inspections of the fabricated pieces while the machines were running in order to ascertain whether a variance

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[3]The Respondent "primarily makes sheet metal parts that form a storage system for the computer industry."

[4]There were 15 or 20 machines in department 14, and 12 machines in department 15.

from the specifications had occurred. The "start" time of each inspection, whether first-piece or intermediate, was recorded on a daily activity sheet[5] on which the piece inspected was identified by number. In addition to the first-piece and intermediate inspections, Lamoureux from time to time performed visual spot inspections of finished pieces stored in holding areas located in the vicinity of the departments. No entries for such spot inspections were required on the daily activity sheet. As part of Lamoureux's job, according to Forte, "[t]here would be times that possibly a part might not conform to the blueprint and if Mr. Lamoureux would feel better by going into another area and checking to see that the part could function as is before making a disposition, he had this universal authority to do that . . . . [i]n the holding areas or the Assembly Department or even Product Development."[6]

On the morning of December 29, 1977, Paul Southard, the plant superintendent, around 9:55 a.m. came to Forte's office and told Forte that he had seen Lamoureux "taking a newspaper and going into the men's room." He asked Forte to "check it out and find out what was going on." Forte went to departments 12 and 14 and continually walked back and forth through these departments for about 35 minutes looking for

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[5] While the daily activity sheet provided for an entry of the start time, Lamoureux testified that he usually entered the finish time. The sheet provided no place to enter the finish time.

[6] An inspector's assignments are always sufficient "to consume 100% of his time."

Lamoureux.[7] About 10:35 a.m. Lamoureux, approaching from the direction of department 16, appeared in department 14. Forte said nothing to Lamoureux but returned to his office where he allegedly wrote, "Bernie not in Dept. 12 or 14 from 10:00 to 10:35—Then saw him at far end of Dept. near time clock." In the afternoon, about 1 o'clock, Forte was distributing a description of a dental plan to the inspection department and was unable to find Lamoureux in department 12 or 14. After about 25 minutes Forte found Lamoureux at a workbench inspecting a part. Forte said, "I've been looking for you. I've got to give you this dental plan." Nothing else was said. Forte returned to the office and allegedly noted, "12:50 to 1:05 not in Dept. 12 or 14, 1:10 to 1:20 not in Dept. 12 or 14. Then he was at coil bench w/pc at 1:20 p.m." Forte did not ask Lamoureux where he had been.

According to Forte, the next morning he checked Lamoureux's daily activity sheet and discovered that Lamoureux had noted that he had performed four inspections between 10 a.m. and 10:35 a.m. and three inspections between 12:55 p.m. and 1:15 p.m., the times when Forte had not seen him in either department 12 or 14. Forte reported his findings to his supervisor, McCallum. McCallum thought that "the offense was a dischargeable offense" and asked Forte to immediately accompany him to the office of Carl Dean, the vice president of manufacturing, and "explain the situation to him in regard to the violation."

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[7] Forte did not check the men's room referred to by Southard nor did he use the paging system to try to locate Lamoureux.

Forte reviewed his findings for Dean, after which Kendall Allen Hodder, the personnel director, was called to the meeting. Dean allegedly said "to check it out with Mr. Lamoureux to find out . . . what the story was. And . . . if what [Forte] found was substantiated through Mr. Lamoureux's description of what might have gone on, then we could discharge him." Thereafter Forte reduced the events involving Lamoureux to writing. A part of this memorandum recited:

> His record sheet shows he allegedly performed specific inspection operations [in] designated departments at times he himself recorded when he was not there as determined by personal and direct observation of his supervisor. This is a categorical violation of group 1 rule #2—falsification of time reports.

Group 1, rule 2, provides that an employee may be discharged for the first infraction of "[k]nowingly altering or falsifying production time reports, payroll records, or time cards, or punching another employee's time card without supervisory approval."[8]

An examination of the traveling inspection report and the credible record reveals that Lamoureux had performed all the inspections noted on his daily activity sheet during the times he was absent from departments 12 and 14. In this regard, Forte testified that "it was irrelevant as far as whether he did the work or didn't do the work as far as the decision to discharge." Forte testified also that he made no effort to deter-

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[8]Personnel Director Hodder testified that the Respondent, under the rule, could exercise its discretion whether to discharge an employee or administer a lesser penalty.

mine whether inspections had actually been made,[9] although that fact could have been ascertained. Later in his testimony on redirect examination, Forte said he was instructed by McCallum to check the traveling sheets while the summary was being typed up and before Lamoureux was contacted. Forte said that he discovered from the traveling sheets that Lamoureux had signed the sheets. Prior to Forte's testimony, McCallum had testified, when called by the General Counsel, to the question:

> Q. But you never made a check on it to see if he actually did [the work] or not?
>
> A. That was not the issue here.

Later, after Forte had testified, McCallum as Respondent's witness testified that:

> I went with him [Forte] for a brief amount of time to evaluate the traveling inspection documents which also go with the job. This evaluation did not indicate anything that would change our mind regarding the offense; there were some documents which had been signed by Mr. Lamoureux and others that had not and in some cases he would not have been required to sign them as there were intermediate inspections involved.[10]

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[9] Forte was asked:

> Q. Then I can assume, can I not, that you made no effort to determine if, in fact, these particular inspections were or were not made, correct?
>
> A. Correct.

[10] The change in the testimony of Forte and McCallum appears to have been an attempt to create the semblance of an investigation whereas there had been none.

At 3 p.m. Lamoureux was called to a meeting with Hodder, McCallum, and Forte. Lamoureux described what occurred:

> Well, they had me read the report and Mr. Forte said that he was out in the departments at that time, and he could not find me there and he showed me my sheets with the times on them. He asked me where I was and I told him I had gone to the men's room, but I had checked the jobs out.[11] So they said, "Well, you've got the times wrong." I believe it was Mr. Hodder and he said, "Didn't you read your rulebook?" So I think it was around that time that I told him, "C'mon, you guys, you know I'm in here because of the Union."
>
> And, Mr. McCallum stated that he didn't believe Frank could trust me anymore,[12] and he didn't even know if the jobs were checked out or not, and that they were going to discharge me; and they gave me my check.

During the conversation Lamoureux told them that the "times weren't accurate and they never were, but [he] told them, 'If you want them right to the second, I can put them right to the second.' " Lamoureux also said that he had made visual checks during the time he was away from departments 12 and 14.[13]

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[11] McCallum testified that Lamoureux told them that he had "performed them earlier, and then just wrote these times in there to fill out this sheet."

[12] McCallum testified that he told Lamoureux that "we could no longer trust him to perform his function, and the requirements of the job, and for falsification of these records." McCallum also observed that "Union activity in no way had anything to do with it."

[13] Forte testified that Lamoureux said he was "down probably in the back checking something."

McCallum asserted that Lamoureux was discharged for falsification of time reports and for no other reason. McCallum explained, "Both Mr. Forte . . . and myself felt that we could no longer trust Mr. Lamoureux in performing his duties. He was indicating that he was on the job, specifying that he actually performed work when he was nowhere near the area; and therefore we could no longer trust him to carry out the duties of his function."

No other employee had been discharged under the same circumstances as Lamoureux.[14] However, employee Geradi, who violated a group 1 rule, was warned not discharged;[15] employee Gleason, who also violated a group 1 rule, was likewise warned and not discharged.[16] In fact, it would appear from an examination of the Respondent's handbook of information for employees that the Respondent was not a harsh employer but tried to understand and be helpful with its employees' problems. In referring to the personnel department, the handbook reveals that "they are here to give you help and guidance. They are expected to insure that both sides of the problem are being brought out fairly. . . . We believe it is healthy to talk

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[14]The only other discharges for falsification of records involved one employee, a salesman who falsified his call reports, thus enabling him to collect money for calls he was not making, and another employee, an accountant, who was embezzling money.

[15]His offense had been deliberate slowing down of production.

[16]Other employees who were only warned were D. Geoffrey, who punched another employee's timecard, and Valerie Rousseau, chief inspector, who failed to punch her timecard and "admitted . . . that someone was punching her timecard. Did not notify her supervisor."

about grievances." Moreover, Forte said that there would have been "nothing wrong" with Lamoureux being in the "bathroom for 15 to 20 minutes." Indeed, Forte agreed that Lamoureux could have been legitimately away from departments 14 and 15 during the time involved for a "multitude of reasons," including conferring with other inspectors in other parts of the plant which could have kept him away from the departments for 10 or 15 minutes, "getting a part from stock" which could have consumed "[m]aybe forty-five minutes," or going to the research and development department.[17] McCallum agreed that a dollar value could not be placed on Lamoureux's inaccurate reporting and considered money not to be the "issue." Moreover, McCallum admitted that Lamoureux had nothing to gain by the alleged falsification.

Lamoureux commenced working for the Respondent in November 1966, and had been an inspector for over 2 years.[18] His work was satisfactory; he received merit increases. When Forte rated Lamoureux in 1977, he was rated average or better than average in all categories (eight categories were marked average; seven better than average). In "potential for advancement," he was rated better than average. In this regard, Lamoureux was trained in the use of the optical comparator, a task which only one other inspector (Rousseau) was capable of performing. It involved the

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[17] It would seem that the reason Forte failed to inquire of Lamoureux as to his whereabouts during his absence was due to the fact that he did not consider Lamoureux's absence to require explanation.

[18] McCallum agreed with the General Counsel that the Respondent had a "real investment" in Lamoureux as an inspector.

inspection of plastics, a difficult job. Lamoureux had instructed other inspectors and had instructed both McCallum and Forte on the optical comparator. Lamoureux had never been disciplined nor had any foreman found fault with his work. From time to time, Lamoureux made helpful suggestions to the Respondent, for which he was commended. Forte agreed that Lamoureux showed concern about doing a good job. A few weeks before Lamoureux was discharged, Forte had commended him for the good work he had performed on the night shift. Forte agreed from his observation of Lamoureux that he "knew what he was doing and could do the job." In fact, Forte said that Lamoureux "seemed to be very proud of the amount of work he was doing." Indeed, Forte commented, "I was very satisfied with the amount of work that it appeared that he was doing." Forte added, "Just looking at the sheets, I would assume that Mr. Lamoureux was performing in an admirable fashion." There is little question that the credible evidence establishes that Lamoureux did perform in an "admirable fashion," except for the inaccuracies which appeared on his daily activity sheet for December 29, 1977. The inattention which the Respondent allowed this detail is illustrated by an examination of several inspectors' daily activity reports. John Murdock's sheet for October 30, 1977, reveals that he entered a start time at 7:75 and the next at 8:00; another at 12:90 and the next at 1:10; and another at 1:75 and the next at 2:00. Other sheets reveal the same discrepancies. On V. Rousseau's sheet of October 28, 1977, she reported start times of 7:60, 7:70, 7:80, and 8:00. On another sheet, she reported 14:80 and 15:00 as successive start times. Her Oc-

tober 25, 1977, sheet shows starting times of 7:50, 7:60, 7:70, 7:80, and 8:00. The same was true on October 24. Other discrepancies appear in her sheets which lead to the conclusion that these were "plugged" entries. A cursory examination of these sheets would have revealed these inaccuracies.

Lamoureux testified that when the form first came out John Larson,[19] his supervisor at the time, told the employees that recording "the time was just to have a general idea of when the part was in a particular area of the shop." Lamoureux further said that Forte had not given oral or written instructions on the subject. Larson testified that he wanted something to the "closest five minutes." Larson also testified that the Brooks system, which was instituted after he put the daily activity sheets into effect, used the form to relate the total number of inspections to production. Larson explained:

> [I]f there were fifty operations run in the department and we covered forty, if we inspected forty of them, we'd have got an eighty percent coverage.

Precise time entries were not considered much of a factor as long as the inspection actually occurred. Both Larson and Forte, who followed Larson as supervisor, reviewed the daily activities sheets of all inspectors and entered on a weekly performance report the percent coverage for each department. The percent coverage was derived from comparing the number of new operations with the number of first-piece inspections. Nothing in this report was related to the time of

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[19] Larson is no longer in the Respondent's employ.

each piece inspection. These reports were reviewed by McCallum.

According to McCallum, the weekly performance reports covered "the percent of coverage in relationship to first piece inspections to the total number of jobs that ran that particular area for the previous week" (80-percent coverage was the norm); "the average number of inspections performed by each individual inspector in a 1-hour period"; the number of inspections performed per hour per inspector (the average inspection took 10 to 15 minutes;[20] and "the actual hours worked both in a daily and weekly basis by inspectors versus planned work hours." Precise time entries for the inspection of each piece were not essential to preparing the weekly performance report.[21] Referring to the daily activity sheet, McCallum said, "We utilize these records for determining levels of staffing, and department and individual performance within a department." Since the sheet noted only start times, there was no way of ascertaining from the sheet (unless otherwise noted) what had been done between the times of the entries.[22] However, the procedure which requires the approval by an inspection before a piece may be produced and the inspector's notation on the

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[20] Forte said the average inspection took about 12 minutes.

[21] McCallum agreed with the General Counsel that the form could be filled out without reference to the entry of a starting time.

[22] Forte testified that a completion time was not included because "the Inspector's job is to continually inspect. When you finish one job and start the next, that is an encompassing factor of the operation. It may be getting of tools and putting away of tools that have to go with the inspection of any given part."

traveling inspection report is a positive check as to whether the inspector has performed the inspection.

II. CONCLUSIONS AND REASONS THEREFOR

It is well established that the General Counsel bears the burden of proving an unlawful discharge,[23] however, ". . . once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." (Emphasis in original.)[24]

Here, the General Counsel has provided ample proof of the Respondent's antiunion motivation. In this regard, the General Counsel has offered credible proof that the discharge of Lamoureux, a union kingpin, would have gratified the Respondent's antiunion stance;[25] that the Respondent had knowledge of Lamoureux's union connections and knew that he was

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[23] See *N.L.R.B.* v. *Borden Co.*, 392 F.2d 412, 416 (C. A. 5, 1968); *G. H. Hicks and Sons, Incorporated*, 141 NLRB 1272, 1273 (1963).

[24] *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

[25] "Of course, the company has a legal right to 'make no bones about its opposition to the Union.' *Hendrix Manufacturing Co.* v. *N.L.R.B.*, 321 F.2d 100, 103 (C.A. 5, 1963). However, the Board is entitled to consider emphatic anti-union attitudes as 'background' against which to measure the impact on employees of management's statements and conduct. 321 F.2d at 103-04, fn. 6." *Independent Inc., d/b/a The Daily Advertiser* v. *N.L.R.B.*, 406 F.2d 203, 205 (C.A. 5, 1969).

a union kingpin;[26] that usually the Respondent did not discharge an employee for the commission of a first offense of the kind here committed; and that the Respondent sustained no losses by reason of Lamoureux's misconduct. Moreover, the Respondent had a substantial investment in the cost of training Lamoureux as an inspector. Additionally, Lamoureux was a satisfactory employee, considered by the Respondent to have been good material for advancement.[27] Without a doubt, the General Counsel has established a *prima facie* case.[28]

In response to the General Counsel's *prima facie* case, the Respondent claims as "legitimate objectives"

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[26]"The discharge of employees who are actively engaged in union affairs gives rise to an inference of violative discrimination." *N.L.R.B.* v. *Montgomery Ward & Co., Incorporated*, 554 F.2d 996, 1002 (C.A. 10, 1977).

[27]"The rule is that if the employee has behaved badly it won't help him to adhere to the Union, and his employer's anti-union animus is not of controlling importance. But if the employee is a good worker and his breach of the work rules trival, the more rational explanation for discharge may be invidious motivation. Such motivation can be found from the absence of any good cause for discharge. This must be so unless we are willing to assume something we know to be false: that businessmen hire and fire without any reason at all.

"In the end after weighing all relevant factors including particularly the gravity of the offense, an unfair labor practice may be found only if there is a basis in the record for a finding that the employee would not have been discharged, though he may have been subjected to a milder form of punishment for the offense, except for the fact of his union activity." *Neptune Water Meter Company, a Division of Neptune International Corporation* v. *N.L.R.B.*, 551 F.2d 568, 570 (C.A. 4, 1977).

[28]"Fundamentally, a *prima facie* case is one which is established by sufficient evidence and can be overcome only by a preponderance of competent, credible rebutting evidence." *National Automobile and Casualty Insurance Co.*, 199 NLRB 91, 92 (1972).

the fact that Lamoureux must remain discharged because his recording of inaccuracies in start times for inspections exhibited an untrustworthiness which it cannot abide in its employees.[29] It added at the hearing that Lamoureux's alleged offense jeopardized the Brooks system of production control.[30] In weighing the Respondent's alleged justification for its conduct, it must be considered that "'an employer may hire and discharge at will, so long as his action is not based on opposition to union activities.'" *N.L.R.B.* v. *The Little Rock Downtowner, Inc.*, 341 F.2d 1020, 1021 (C.A. 8, 1965), citing *N.L.R.B.* v. *South Rambler Company*, 324 F.2d 447, 449 (C.A. 8, 1963). "[A]bsent a showing of antiunion motivation, an employer may discharge an employee for a good reason, a bad reason, or for no reason at all." *O. A. Fuller Super Markets, Inc.*, 374 F.2d 197, 200 (C.A. 5, 1967). However, "[t]he mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity." *N.L.R.B.* v. *Symons Manufacturing Co.*, 328 F.2d

[29] "There is clearly no obligation on the Board to accept at face value the reason advanced by the employer." *N.L.R.B.* v. *Buitoni Foods Corp.*, 298 F.2d 169, 174 (C.A. 3, 1962).

[30] This alleged justification has no validity at all. The credible evidence discloses that the start time entries are not essential nor are they noticed in the compilation of the weekly performance report which is the only document from the inspection department which is utilized within the Brooks system. The Brooks system functions without reference to the start time entries. The Respondent's reliance on this unsubstantiated justification is totally unconvincing and "bear[s] the hallmarks of afterthought." *N.L.R.B.* v. *S.E. Nichols-Dover, Inc.*, 414 F.2d 561, 564 (C.A. 3, 1969).

835, 837 (C.A. 7, 1964). "A justifiable ground for dismissal is no defense if it is a pretext and not the moving cause." *N.L.R.B.* v. *Solo Cup Company*, 237 F.2d 521, 525 (C.A. 8, 1956). "[T]he 'real motive' of the employer in an alleged § 8(a)(3) violation is decisive. . . " *N.L.R.B.* v. *Brown Food Store*, 380 U.S. 278, 287 (1965). I am convinced that the "real motive" for the Respondent's discharge of Lamoureux was to discourage membership in a labor organization. As for trustworthiness, Lamoureux's work pattern had been the same for over 2 years, concerning which the Respondent had registered no complaints. His work had been satisfactory. The amount of work he produced indicated that he had not and was not cheating the Respondent. His production satisfied the norm set by the Brooks system. Moreover, if the untrustworthiness charge (which sprang from the inaccuracies in the start time recording) is valid, then other inspectors would also have been guilty of untrustworthiness since their daily activity reports disclosed on their faces (and easily discernible) inaccuracies in the recording of start times.[31] Indeed, the credible evidence does not reveal that the Respondent had insisted on a wholly accurate recording of the start times. Furthermore, other employees who were guilty of group 1 rule offenses were warned rather than discharged for the first offense.[32] Moreover, considering the high standard of trustworthiness which the Respondent was exacting from

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[31] The little apparent attention which the Respondent gave this detail obviously invited abuse.

[32] "[V]ariance from the employer's 'normal employment routine'" further supports illegal motive. *McGraw-Edison Company* v. *N.L.R.B.*, 419 F.2d 67, 75 (C.A. 8, 1969).

Lamoureux, it is incongruous that it required so little from Chief Inspector Rousseau that she received only a warning for having another employee punch her timecard. Her "phonied up" timecard should arouse a strong suspicion of dishonesty since she could have used the phony card to cover up an absence, tardiness, or early quitting time, any of which would have cost the Employer money. Moreover, if Rousseau had "phonied up" her timecards, it seems likely that she might have "phonied up" her start times on her daily activity sheets. For the offense Rousseau could have been discharged (see Group 1, rule 2, cited above), but she was not. Disparate treatment is obvious; discrimination proved.[33]

Thus, the record reveals that Lamoureux's first offense of seemingly inoffensive significance[34] (at least when measured by the Respondent's past practice) was blown up to a point where it accommodated the Respondent's antiunion stance.

The credible evidence further supports a finding that Forte showed little concern for Lamoureux's absence from his job on the two occasions even though Plant Superintendent Southard asked him to check Lamoureux out. His concern deepened only after his conference with McCallum, and the whole incident ripened into a discharge after Dean and Hodder be-

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[33] This discrimination assumes a more pronounced aspect when one considers the reprehensible character of phony timecards which the Board describes in *Rock Tenn Company, Corrugated Division*, 234 NLRB No. 126 (1978), "[F]alsification of the timecard amounts to dishonesty and theft."

[34] When measured in terms of need for the information to be derived from exact start times, the offense becomes trivial.

came involved. Indeed, the decision to discharge and the preparation of Lamoureux's final check were wholly completed before the Respondent allowed Lamoureux to counter the charge of untrustworthiness. His discharge was already a *fait accompli*. His good points, the fact that he had actually made the inspections and was not cheating the Respondent, and his explanation for the inaccurate recordings were ignored in reaching the decision to discharge him. The Respondent's attitude was—"Ah ha, we caught him committing an infraction, he must be summarily fired without recourse." This attitude seems strange and unexplainable for an employer who boasts an enlightened approach to employee problems and grievances in its handbook. It is obvious that the seriousness of the offense was magnified to fit the Respondent's predetermined penalty. When "the reasons advanced [for a discharge] are not persuasive, the [protected activity] may well disclose the real motive behind the employer's action." *N.L.R.B.* v. *Melrose Processing Co.*, 351 F.2d 693, 699 (C.A. 8, 1965).

I am convinced that the Respondent's "real reason" for discharging Lamoureux was concealed and the reason aserted by the Respondent was false. I draw this conclusion from the record as a whole and from the demeanor of the witnesses produced by the Respondent. I do not believe that they were truthful in revealing the "real reason" for Lamoureux's discharge. The Board has recently said in *Best Products Company, Inc.*, 236 NLRB No. 108 (1977):

> In *Shattuck Denn Mining Corporation* v. *N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9, 1966), the

> court stated that where the trier of fact finds that an asserted motive for discharge is false he can infer that there is another motive. "More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where the surrounding facts tend to reinforce that inference."

In any event I conclude that the discharge of Lamoureux was not based on the reasons declared by the Respondent, but resulted from the Respondent's desire to discourage union activity and gratify its anti-union purposes.[35] "'It is well settled that the mere existence of a valid ground for discharge is no defense to an unfair labor charge if such ground was a pretext and not the moving cause.' It must be shown, however, that the improper motive—union activity—is the dominant reason for the discharge. . . " *N.L.R.B.* v. *Pioneer Plastics Corporation*, 379 F.2d 301, 307 (C.A. 1, 1967). "[A] business reason cannot be used as a pretext for discriminatory firing." *N.L.R.B.* v. *Ayer Lar Sanitarium*, 436 F.2d 45, 50 (C.A. 9, 1970). Respondent clearly used its reasons as pretexts. It is also clear that the "dominant reason for discharge" was Lamoureux's union activities. Cf. *Berbiglia, Inc.*, 237 NLRB No. 18 (1978).

In consideration of this finding, I have reviewed the decisions of the First Circuit upon which the Respondent so heavily relies. The Respondent asserts that the General Counsel has not met the burden of

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[35] In this regard, the Respondent had vigorously opposed the Union during the 1976 and 1977 election campaigns, and no doubt by the discharge of Lamoureux was preparing for the 1978 campaign.

proof in such decisions, specifically citing *N.L.R.B.* v. *Rich's of Plymouth, Inc.*, 578 F.2d 880, 886 (C.A. 1, 1978), as follows:

> Respondent having offered a legitimate business justification for its conduct, the burden shifted to the Board to establish by substantial evidence "an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one," *N.L.R.B.* v. *Billen Shoe Co.*, 397 F.2d 801, 803 (C.A. 1, 1968). In our *repeated efforts to impress this standard* upon the Board we have variously redefined it to mean that the decision would not have been made "but for" the employee's union activity, *Coletti's Furniture, Inc.* v. *N.L.R.B.*, 550 F.2d 1292, 1293 (C.A. 1, 1977), that union animus was the "dominant" reason, *N.L.R.B.* v. *Lowell Sun Publishing Co.*, 320 F.2d 835, 842 (C.A. 1, 1963), or the "controlling" motive, *N.L.R.B.* v. *Fibers International Corporation*, 439 F.2d 1311, 1315 (C.A. 1, 1971). By whatever phraseology, we have attempted to make it clear that *the mere existence of anti-union animus is not enough*" to make out a section 8(a)(3) violation, *N.L.R.B.* v. *Billen Shoe, supra*, 397 F.2d at 803. [Emphasis supplied.]

In addition, I have examined the First Circuit decisions cited in the *Rich's of Plymouth* case, *Hubbard Regional Hospital* v. *N.L.R.B.*, 98 LRRM 2891, 84 LC ¶10,665 (1978), cited by the Respondent, and *P.S.C. Resources, Inc.* v. *N.L.R.B.*, 576 F.2d 380 (1978).[36] While I am not convinced that the Re-

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[36] In this case, the court used the language: "However, the evidence that the reasons petitioner has offered for the discharge are 'inconsistent with its previous practice, against its apparent interest and inconsistent with its subsequent ac-

spondent has offered a legitimate business justification for its conduct (since Lamoureux's omission could have been easily corrected by counseling without any serious consequence to the Respondent),[37] nevertheless, assuming *arguendo* that a legitimate business justification was forthcoming, I am convinced that the General Counsel has met the First Circuit's burden. The Respondent chose the "bad" cause because it wanted to rid itself of a union partisan and commence to gird itself against the probable next union election campaign. I do not think this was Forte's idea. It originated with Forte's supervisors. I consider Forte to be an honest, forthright individual who was not generally given to lying. As I watched him testifying, this impression prevailed until he was subjected to questions concerning Lamoureux's discharge. Here, being gen-

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tions' . . . sufficiently compensates for the other weak links in respondent's case." 576 F.2d at 384. In the instant case, it obviously was not in the Respondent's best interests to discharge a well-trained, competent employee (who was considered a "real investment"). Moreover, for offenses involving untrustworthiness of as serious a nature, the Respondent had not discharged employees. Indeed, there was no showing by credible evidence that it had been the Respondent's general practice to discharge an employee where the consequences of his offense caused little serious detriment to the Respondent, as here, for the first offense.

[37] "Such action on the part of an employer is not natural. If the employer had really been disturbed by the circumstances it assigned as reasons for these discharges, and had had no other circumstances in mind, some word of admonition, some caution that the offending lapse be not repeated, or some opportunity for correction of the objectionable practice, would be almost inevitable. The summariness of the discharges of these employees, admittedly theretofore satisfactory, gives rise to a doubt as to the good faith of the assigned reasons." *E. Anthony & Sons, Inc.*, 163 F.2d 22, 26—27 (C.A.D.C., 1947).

erally a truthful man, he showed physical signs of dissembling. One would have had to have been a novice in this business not to have known he was covering up for his superiors. The Lamoureux incident became a "Federal case" upon its having reached a level of supervision beyond Forte where it was decided that Lamoureux should be discharged forthwith. Indeed, his final check was drawn before he was allowed to state his position.[38]

Respondent's reasons for Lamoureux's discharge were both false and pretextual. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Bernard R. Lamoureux on December 30, 1977.[39]

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it

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[38] As the court observed in *United States Rubber Company* v. *N.L.R.B.*, 384 F.2d 660, 662—663 (C.A. 5, 1967), "Perhaps most damning is the fact that [the employee was] summarily discharged after reports of . . . misconduct . . . without being given any opportunity to explain [his conduct] or give [his] version of the incidents." Here Lamoureux's hearing was to give an air of legitimacy to unlawful action already taken.

[39] I have considered the decision of the Massachusetts Division of Employment Security in which it was found that "the claimant did not falsify his daily quality control sheet as alleged by the employer," pursuant to the Board's decisions on the subject. *Duquesne Electric and Manufacturing Company*, 212 NLRB 142 (1974). However, had I not considered it, my decision would have been the same.

will effectuate the policies of the Act for jurisdiction to be exercised herein.

3. By unlawfully discharging Bernard R. Lamoureux on December 30, 1977, and refusing thereafter to reinstate him, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It having been found that the Respondent unlawfully discharged Bernard R. Lamoureux on December 30, 1977, in violation of Section 8(a)(3) and (1) of the Act, it is recommended in accordance with the Board policy that the Respondent be ordered to offer the foregoing employee immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, dismissing if necessary any employee hired on or since December 30, 1977, to fill said position, and make him whole for any loss of earnings that he may have suffered by reason of the Respondent's acts herein detailed, by payment to him of a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the

date of an offer of reinstatement, less net earnings during such period, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB No. 117 (1977).[40]

Additionally, because the Respondent's unfair labor practices go to the very heart of the Act, a broad order requiring Respondent to cease and desist from in any other manner infringing upon rights guaranteed to its employees by Section 7 of the Act is recommended. *N.L.R.B.* v. *Entwistle Manufacturing Co.*, 120 F.2d 532 (C.A. 4, 1941).

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[41]

The Respondent, Wright Line, a Division of Wright Line, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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[40] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[41] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Discouraging membership in Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by unlawfully discharging any of its employees or discriminating against them in any other manner with respect to their hire or tenure of employment in violation of Section 8(a)(3) of the Act.

(b) In any other manner interfering with, restraining, or coercing any employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended, to engage in self-organization, to bargain collectively through a representative of their own choosing, to act together for collective bargaining or other mutual aid or protection, or to refrain from any and all these things.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Bernard R. Lamoureux immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, discharging if necessary any employee hired to replace him and make him whole for any loss of pay that he may have suffered by reason of the Respondent's unlawful discharge of him in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other

records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its facility at Worcester, Massachusetts, copies of the attached notice marked "Appendix."[42] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by the Respondent's representative, shall be posted by it, immediately upon receipt thereof, for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C. October 27, 1978

/s/ _____

LOWELL GOERLICH
Administrative Law Judge

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[42] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all parties participated and offered evidence, the National Labor Relations Board has found that we unlawfully discharged Bernard R. Lamoureux because he engaged in lawful protected union activities and it has ordered us to post this notice and abide by the following:

WE WILL NOT discourage membership in Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization by unlawfully discharging any employees or discriminating against them in any other manner with respect to their hire or tenure of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act to engage in self-organization, to bargain collectively through a representative of their own choosing, to act together for collective bargaining or other mutual aid or protection, or to refrain from any and all these things.

WE WILL offer Bernard R. Lamoureux reinstatement to his former job or, if his job no

longer exists, to a substantially equivalent job, discharging, if necessary, any employee hired to replace him.

WE WILL restore his seniority and other rights and privileges and WE WILL pay him the backpay he lost because we discharged him, with interest.

WRIGHT LINE, A DIVISION
OF WRIGHT LINE, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3313.

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No. 80-89

In the
Supreme Court of the United States
OCTOBER TERM, 1980

LEAK REPAIRS, INC.,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY IN SUPPORT OF PETTITION FOR CERTIORARI

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Respondent.

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

It is obvious that the Board does not want the Court to settle the controversy between the circuits as to whether the Court's *Mt. Healthy* and *Givhan* rationale or rule of causation for determining whether a termination of employment was for valid reasons or was to discourage civil or constitutionally protected rights should apply to Labor Act cases.

The Brief in Opposition asserts the questions presented by the Petition for Certiorari really do not exist because the Board and the Seventh Circuit held that the "real reason" for the discharges of Jenkins and Paver was their desire that the branch be unionized. This is

lifting by bootstraps. It does not answer the question as to how the conclusion, one way or the other, should be reached. The Brief asks the Court to accept appellate counsels' *post hoc* rationalizations as a basis for needlessly perpetuating sharp conflict and uncertainty in this troubled area—a strategy viewed with disfavor by the Court. *NLRB* v. *Metropolitan Ins. Co.,* 380 U.S. 438, 443, 444 (1965).

The brief writers would almost have the Court believe the Seventh Circuit did not realize the difference between its "in part" or "tained" motive doctrine and the "but for" test. That is a disservice to the Seventh Circuit and to this Court. The Seventh Circuit knew precisely what it was doing and tartly said that the "but for" rule of *Mt. Healthy* did not apply in the Seventh Circuit. (See Pet. 30 a) The Seventh Circuit relied heavily upon its 1980 decision of *Chicago Magnesium Castings Company* v. *NLRB,* 612 Fed. 2d 1028, which referred to the First Circuit's "but for" *Eastern Smelting* decision and said the "but for" standard was not "endorsed" by the Seventh Circuit. (612 F. 2d at 1034) Both Judges Cummings and Bauer sat on the panels in that and this case, with Judge Cummings writing the opinion in *Chicago Magnesium.* The Seventh Circuit knew what it was doing here and deliberately announced that it was not going to follow those circuits which held that *Mt. Healthy* required application of the "but for" rule to Labor Act cases.

The Brief in Opposition is but a glib collection of outworn shibboleths ("pretextual" for example), and factual assertions that in no event are going to be settled in this Court. It has no substance and is simply an effort to

forestall decision by the Court on a question which the director of the Board's Office of Appeals has said must be resolved here.[1] (See Pet. p. 16, n. 9)

Respectfully submitted,

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August 29, 1980

[1] Mr. Robert E. Allen, now Acting Associate General Counsel, whose name, strangely enough, appears on the Brief in Opposition.